STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: August 28, 2013]

RHODE ISLAND ECONOMIC DEVELOPMENT CORPORATION	:	
V.	:	**C.A. No. PB-12-5616**
WELLS FARGO SECURITIES, LLC; BARCLAYS CAPITAL, INC.; FIRST SOUTHWEST COMPANY; STARR INDEMNITY AND LIABILITY COMPANY; CURT SCHILLING; THOMAS ZACCAGNINO; RICHARD WESTER; JENNIFER MACLEAN; ROBERT I. STOLZMAN; ADLER POLLOCK & SHEEHAN, P.C.; MOSES AFONSO RYAN LTD.; ANTONIO AFONSO, JR.; KEITH STOKES; and J. MICHAEL SAUL	:	

DECISION

SILVERSTEIN, J. Before this Court are the Motions to Dismiss of all fourteen Defendants, seeking to dismiss all sixteen counts of the Plaintiff's First Amended Complaint (Complaint).

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I

Facts and Travel

The basic plot is well-known: 38 Studios, LLC (38 Studios) was induced to move its business to the Ocean State in exchange for a massive financial accommodation; less than two years later, 38 Studios went bankrupt. Much has been written about that plot in the media. Much has been discussed and debated—and continues to be discussed and debated—in the other two branches of government. In this legal action, at this Motion to Dismiss stage, however, the Court considers only the facts alleged in the Complaint by the EDC. The Standard of Review is set out more fully below, but the facts described in this section are gleaned directly from the Complaint, and the Court must accept all of the allegations in the Complaint as true. The facts in this section provide the context for the issues in this legal action. A more detailed discussion of the factual allegations is woven into the legal analysis that follows.

A

Parties, Key Non-Parties, and Relationships

The Plaintiff is the Rhode Island Economic Development Corporation (EDC or Plaintiff), a quasi-public corporation established by G.L. 1956 § 42-64-1 et seq. (Compl. ¶ 1.) The EDC was created "[t]o promote and encourage the preservation, expansion, and sound development of new and existing industry, business, commerce, agriculture, tourism, and recreational facilities in the state, which will promote the economic development of the state and the general welfare of its citizens." Sec. 42-64-5. The powers of the EDC are vested in its Board of Directors (EDC Board). (Compl. ¶ 3.)

There are fourteen total defendants, nine of whom served the EDC. Id. ¶¶ 4-15. Keith Stokes (Stokes) served as Executive Director of the EDC, and J. Michael Saul (Saul) was Deputy Director. Id. ¶ 14-15. First Southwest Company (First Southwest) was the EDC's financial advisor. Id. ¶ 6. Adler Pollock & Sheehan, P.C. (Adler Pollock) was the EDC's general counsel from 1991 through January 2011; Robert Stolzman (Stolzman) was the attorney assigned by Adler Pollock to have primary responsibility for matters involving the EDC. Id. ¶ 12. Additionally, Stolzman served as Secretary of the EDC until January 2011. Id. Moses Afonso Ryan Ltd. (Moses Afonso) provided professional legal services to the EDC regarding the 38 Studios transaction; Antonio Afonso, Jr. (Afonso) was the attorney assigned to EDC matters.[1] Id. ¶ 13. Wells Fargo Securities, LLC (Wells Fargo) and Barclays Capital, Inc. (Barclays) acted as placement agents for the issuance of the Bonds. Id. ¶¶ 4-5.

[1] In this Decision, when "Moses Afonso" is used, it encompasses both Moses Afonso Ryan Ltd. and Antonio Afonso. Similarly, when "Adler Pollock" is used, it encompasses both Adler Pollock & Sheehan, P.C. and Robert Stolzman. Collectively, Adler Pollock, Stolzman, Moses Afonso, and Afonso are referred to as the "Law Firms."

38 Studios is not a defendant in this action; it currently is the subject of a bankruptcy proceeding in the United States Bankruptcy Court for the District of Delaware and a receivership proceeding in this Court. Id. ¶ 16. Four individuals formerly associated with 38 Studios, however, are defendants. Curt Schilling (Schilling) was majority stockholder and chair of the 38 Studios Board of Directors (38 Studios Board). Id. ¶ 8. Thomas Zaccagnino (Zaccagnino) was also a member of the 38 Studios Board. Id. ¶ 9. Jennifer MacLean (MacLean) served as President and Chief Executive Officer of 38 Studios, while Richard Wester (Wester) served as its Chief Financial Officer.[2] Id. ¶¶ 10-11. Starr Indemnity and Liability Company (Starr Indemnity or Starr) issued an insurance policy to 38 Studios and its subsidiaries. Id. ¶ 7.

B

The Impetus for the Deal

The relocation in exchange for economic incentives grew out of a conversation between Schilling and then Rhode Island Governor Donald Carcieri (Governor Carcieri) at a fundraiser at Schilling's residence in March 2010. Id. ¶ 33. At the time, 38 Studios was located in Maynard, Massachusetts (with a subsidiary located in Baltimore) and was developing two significant video games. Id. ¶ 34. Soon after the conversation between Governor Carcieri and Schilling, Governor Carcieri informed Stolzman and Stokes of 38 Studios' interest and "instructed them to employ the EDC to accomplish the relocation of 38 Studios to Rhode Island." Id. § 35. In turn, Stolzman and Stokes informed Moses Afonso, Afonso, Saul, and a Managing Director of First Southwest of this instruction. Id.

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[2] Collectively, Schilling, Zaccagnino, MacLean, and Wester are referred to as the "38 Studios Defendants."

C

The Beginning of the Deal and the Bond Authorization

Early on, the 38 Studios Defendants informed Stokes, Saul, and Stolzman that they needed to receive a net sum of $75 million to relocate to Rhode Island and complete the online video game Project Copernicus (Copernicus). Id. ¶ 37. This information was incorporated into a draft "Term Sheet" on March 31, 2010 with the following language:

> "We understand your capital needs to bring your project Copernicus to MMO completion to be $75,000,000. Based on our understanding to date of your financial projections, the EDC would either guarantee the repayment [of] annual debt service of up to $75M of the company's borrowing or issue $75M of revenue bonds, the proceeds of either of which would provide the necessary financing to complete production on Copernicus and begin relocating 38 Studios to Rhode Island."

Id. The Term Sheet "contained the most important terms and conditions for the EDC's loan to 38 Studios, and represented the guidelines for the parties' counsel to prepare the final contract documents." Id. It also provided that "38 Studios would pay the EDC a guaranty fee of $375,000 out of the proceeds of the Bonds, and $1,125,000 on each anniversary date of the Closings." Id. ¶ 51. Financial projections prepared by 38 Studios and dated April 1, 2010 assume that 38 Studios would receive net loan proceeds of $75 million—those projections were utilized unchanged until the closing and issuance of the bonds on November 2, 2010. Id. ¶ 41. Wells Fargo received the April 1, 2010 Projections and other financial projections from 38 Studios. Id. ¶ 45. Wells Fargo incorporated those projections into an equity private placement memorandum (Equity PPM) which it prepared on behalf of 38 Studios, but also which it gave to the EDC's attorneys and First Southwest in May 2010. Id. ¶¶ 45, 116. The Equity PPM, however, failed to attract any investors. Id. Some of the Defendants later discussed "grossing up" the amount to $85 million to account for the debt service reserve fund (where an amount of the EDC's projected maximum liability for interest and principal in any year would be set aside) and closing costs so that 38 Studios would receive a full $75 million, but they decided that such an increase in the gross amount was not feasible. Id. ¶¶ 38, 46.

The custom and practice of the EDC was to analyze a loan applicant's financial projections in an internal credit memorandum "to identify and analyze the risks that the applicant might default because of inability to repay the proposed loan." Id. ¶ 56. Between April and June 2010, an EDC analyst reviewed the 38 Studios projections and compiled: (1) a list of additional information that was needed, and (2) a list of risks involved in the proposed loan. Id. ¶¶ 58, 60-61. On May 31, 2010, the EDC analyst sent a preliminary list of additional information to Saul and shared his thoughts with Saul, including the following statement: ". . . **I don't think I can support a $75 million guarantee to any single company in this industry due to the wide volatility in commercial success of game releases.**" Id. ¶ 62 (emphasis in Complaint). After 38 Studios received both of the EDC analyst's lists on June, 4, 2010, Saul told the analyst not to prepare an internal credit memorandum and excluded the analyst from further analysis of the loan. Id. ¶¶ 63-64. No internal credit memorandum was prepared, but Saul told the EDC Board at a presentation that the EDC staff had "completed normal credit due diligence." Id. ¶¶ 64-65. Other contents of Saul's presentation to the EDC Board conflict with the analyst's list of risks. See id. ¶¶ 66-68.

On June 2, 2010, EDC staff and counsel, including Saul and Stolzman, participated in a meeting and conference call with representatives from Strategy Analytics and/or Perimeter Partners, companies "retained to advise the EDC concerning certain aspects of the potential loan to 38 Studios and make a presentation to the EDC Board." Id. ¶ 160. The opinions expressed by Strategy Analytics at that meeting were negative, and representatives indicated that they would not go forward with the deal if they were in the EDC's position. Id. ¶¶ 162, 167. On June 10, 2010, however, Strategy Analytics issued a written report that, at least in part, contradicted its June 2, 2010 opinions. Id. ¶¶ 163-64.

On June 11, 2010, the General Assembly enacted a law "authorizing the EDC to establish the Jobs Creation Guaranty Program, and granting the EDC authority to issue bonds or guaranties under said program in an amount not exceeding $125,000,000 extant at any time." Id. ¶ 73. As the EDC Board began to discuss financing the deal with 38 Studios under the Jobs Creation Guaranty Program, Wells Fargo was soliciting an appointment as the EDC's placement agent, "which involved putting together the factual disclosure of the risks of the transaction in an offering document such as a private placement memorandum, and selling the Bonds on behalf and for the account of the EDC." Id. ¶¶ 75-77.

At a June 14, 2010 EDC Board Meeting, Strategy Analytics formally presented its written report to the EDC Board and made a presentation. Id. ¶¶ 165-66. During the presentation, "a director asked a representative of Strategy Analytics if he would go forward with the proposed loan to 38 Studios if he were in the place of the EDC, and the representative responded affirmatively." Id. ¶ 167. At that meeting, the EDC Board adopted an Inducement Resolution, granting preliminary approval for the issuance of bonds not to exceed an aggregate principal amount of $75 million to finance a loan to 38 Studios, "subject to . . . receipt and satisfactory review of Project budget, specifications, plans, and essential contracts." Id. ¶ 83.

In a meeting with representatives from many of the Defendants, participants discussed the business plan in light of a shortfall in EDC financing; Zaccagnino and Wester confirmed that 38 Studios would not be able to relocate to Rhode Island and complete Copernicus without additional capital beyond the capital anticipated in the April 1, 2010 Projections. Id. ¶¶ 87-88.

A Wells Fargo representative noted that Wells Fargo was considering trying to obtain equity financing for 38 Studios, but Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, and First Southwest never followed up with that idea. Id. ¶¶ 89-90. Ultimately, no such additional funds were obtained. Id. ¶ 90. On June 24, 2010, Stolzman circulated a revised Term Sheet that added the word "net":

> "We understand your capital needs to bring project Copernicus to completion to be approximately $75,000,000. Based on our understanding to date of your financial projections, subject to the terms and conditions set forth herein and required legal procedures, the RIEDC is willing to issue $75M of revenue bonds pursuant to its newly created Jobs Creation Guaranty Program, **the net proceeds of which would provide the necessary financing to relocate 38 Studios to Rhode Island, complete production of Copernicus, and capitalize the company's growth and expansion in Rhode Island**."

Id. ¶ 92 (emphasis in Complaint). The EDC alleges that this statement was a misrepresentation and contained an omission. Id. ¶¶ 93-94. This version of the Term Sheet was sent to EDC Board Members on July 13, 2010 and was to be reviewed at the EDC's July 15, 2010 meeting. Id. ¶¶ 96-97. Although some Defendants presented at the meeting and others were present, "no one informed the EDC Board of the inevitable shortfall, or acknowledged that the Term Sheet incorrectly stated that the net proceeds would provide sufficient financing to enable 38 Studios to relocate to Rhode Island and complete production of Copernicus, let alone 'capitalize the Company's growth and expansion in Rhode Island.'" Id. ¶ 97. The Board authorized EDC staff and counsel to continue negotiations. Id.

On July 22, 2010, Afonso sent a draft of an Authorizing Resolution to Saul, First Southwest, Wells Fargo, MacLean, Zaccagnino, and Wester. Id. ¶ 100. As required by statute, the Authorizing Resolution contained an assertion the EDC had found that "adequate provision has been made or will be made for the payment of the cost of the construction, rehabilitation, operation and maintenance and upkeep of the Project." Id. The document also expressly incorporated the Term Sheet and required that closing documents be "substantially in conformity" with the Term Sheet. Id. Prior to the EDC Board's July 26, 2010 meeting, Stolzman procured MacLean's signature and Stokes' signature on the Term Sheet given to the EDC Board prior to the July 15, 2010 meeting. Id. ¶ 106. At the July 26, 2010 EDC Board meeting, Afonso provided details about the Authorizing Resolution to the EDC Board, but did not disclose the projected shortfall. Id. ¶ 108. The EDC Board adopted the Authorizing Resolution. Id. ¶ 107.

D

The Months Leading Up to the Issuance of the Bonds

The Authorizing Resolution authorized the distribution of a "Private Placement Memorandum" (Bond PPM), and Wells Fargo undertook the "responsibility to prepare the Bond PPM and assist the EDC to sell the Bonds, on its own behalf and on behalf of Defendant Barclays, with Barclays' knowledge and agreement." Id. ¶¶ 113, 115. Wells Fargo's earlier Equity PPM, prepared for 38 Studios, stated that "[t]here can be no assurance that additional capital from any source will be available when needed or on terms acceptable to the Company." Id. ¶ 116. The Bond PPM did not contain that warning and did not disclose that the net proceeds would not be sufficient for 38 Studios to relocate to Rhode Island and complete Copernicus. Id. ¶ 118.

Wells Fargo initially drafted a power point presentation to show to investors. Id. ¶ 127. The draft was sent to Afonso, Stolzman, Saul, MacLean, Wester, Zaccagnino, and First Southwest; First Southwest suggested an edit that was incorporated. Id. ¶¶ 127-28. The presentation occurred on October 6, 2010, and Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, Stokes, Wells Fargo, and First Southwest, together with Schilling, "acted in concert as joint presenters throughout the actual presentation." Id. ¶ 130. The presentation included a slide that represented that the net proceeds of the bonds would be used: "To provide the necessary financing to relocate 38 Studios, LLC to Providence, Rhode Island"; "Complete production of Copernicus"; "Capitalize 38 Studios, LLC growth and expansion in Rhode Island"; and "Fund the Capital Reserve Fund (MADS)." Id. ¶¶ 128-130.

On October 22, 2010, Wells Fargo, the EDC, and 38 Studios executed a Bond Placement Agreement (BPA), wherein Wells Fargo agreed to use its best efforts to privately place all of the bonds. Id. ¶ 132. Stolzman, Adler Pollock, Moses Afonso, and First Southwest negotiated the BPA on behalf of the EDC; Zaccagnino, Wester, and MacLean negotiated it on behalf of 38 Studios; counsel for Wells Fargo and Barclays negotiated it on behalf of Defendants Wells Fargo and Barclays.[3] Id. ¶ 134. Among other things, the BPA contains "Issuer Representations, Warranties and Covenants," which assert no conflict with state law and the correctness of the Bond PPM. Id. ¶¶ 133-139. The BPA also notes a Placement Agents' fee of $634,065.00 and a disclosure fee to be paid to Wells Fargo by 38 Studios out of the project funds after the Closing. (Pl.'s Ex. 6, BPA ¶¶ 1, 14, Oct. 22, 2010; Compl. ¶ 155.) The final paragraph of the BPA states, "The Placement Agent does not anticipate any remuneration with respect to the 2010 Bonds other than the Placement Agent's discount of $634,065.00 and the disclosure fee of $50,000.00." (Pl.'s Ex. 6, BPA ¶ 18, Oct. 22, 2010; Compl. ¶ 157.)

On November 1, 2010, the EDC, 38 Studios, and Bank of New York Mellon (the Trustee) entered into a Loan and Trust Agreement, which provided for:

"(a) the [EDC's] issuance of the bonds;

[3] Wells Fargo signed the document on behalf of itself and Barclays. (Pl.'s Ex. 6, BPA, Oct. 22, 2010.)

> (b) the [EDC's] Loan of the proceeds of the Bonds to [38 Studios];
>
> (c) [38 Studios'] repayment of the Loan from the [EDC] through payment to the Trustee of all amounts necessary to pay the Bonds issued by the [EDC];
>
> (d) the [EDC's] assignment to the Trustee in trust for the benefit and security of the Bond owners of the [EDC's] rights under [the Loan and Trust Agreement] and revenues to be received from [38 Studios] hereunder . . .
>
> (e) the State's appropriation of funds in the amounts necessary to pay the Bonds as a result of [38 Studios'] default on its obligation to repay the Loan."

(Pl.'s Ex. 7, Loan and Trust Agreement, Nov. 1, 2010.) On November 2, 2010, the EDC issued the Bonds with the total principal amount of $75 million, and Wells Fargo and Barclays sold them to investors. (Compl. ¶ 142.)

E

The Allocation of the Bond Proceeds and Other Payments

"38 Studios received net proceeds from the Closings totaling $49,481,832.91, which were paid in five separate payments over the twelve-month period from November 2, 2010 through November 8, 2011." Id. ¶ 145. The remaining $25,518,167.09 was allocated as follows:

> "a. Deposit to Debt Service Reserve Fund $12,749,912.50
>
> b. Deposit to Prepaid Interest Account $10,604,076.63
>
> c. Placement Agents' Discount $ 634,065.00
>
> d. Municipal Bond Insurance $ 562,935.45
>
> e. EDC Commitment Fee $ 375,000.00
>
> f. Other Fees Paid at Closing $ 592,177.51."[4] Id.

[4] The Deposit to Prepaid Interest Account and Other Fees at Closing, which includes a breakdown of professional services fees, are elaborated upon at Complaint ¶ 145, n.1-2 and ¶ 147.

In addition to its fees noted in the BPA, on December 16, 2010, Wells Fargo received $473,512.19[5] from 38 Studios pursuant to a May 20, 2010 agreement. Id. ¶¶ 148-152.

F

Third-Party Monitoring

In a July 22, 2010 memorandum drafted by Stolzman and reviewed by Afonso, Stokes informed the EDC Board that the benefits and safeguards of a completion bond—not available "because of the project's size and insurance marketplace conditions"—could be replicated by a third-party assessment and monitoring system. Id. ¶¶ 183-84. The Term Sheet was revised and incorporated into the Authorizing Resolution, with the following provision:

> "The bond documents shall reflect the development and implementation of a third party monitoring, reporting and response process regarding the development schedule and budget for project Copernicus to assure that the company's development of project Copernicus remains on time and on budget pursuant to costs, terms and conditions satisfactory to the parties in their sole and absolute discretion."

Id. ¶ 185. After another third party monitor was rejected, International Business Machines (IBM) was selected as third party monitor. Id. ¶ 189. IBM refused to enter into an agreement with the EDC or to have any obligations to the EDC. Id. ¶ 190. IBM entered into an agreement with 38 Studios that expressly prohibited either party from assigning rights to a third party. Id. ¶ 191. Nevertheless, "Stolzman recommended and Defendants Saul, Stokes, and Afonso agreed that the EDC should enter into a Project Monitoring Agreement solely with 38 Studios that purported to assign to the EDC all of 38 Studios' rights against IBM." Id. ¶ 193.

"Stolzman, Adler Pollock, Moses Afonso, Afonso, First Southwest, Stokes, and Saul negotiated the loan and trust agreement between the EDC and 38 Studios (the "Loan and Trust Agreement"), on behalf of the EDC." Id. ¶ 195. The Loan and Trust Agreement did not include

[5] Although the section heading uses $473,912.19, the Court uses the total number in ¶ 151.

a clear provision that required an initial assessment. Id. ¶ 196. The Bond PPM included a provision that "[t]he Issuer [EDC] entered into an agreement with International Business Machines Corporation ("IBM") on September 14, 2010 to provide these third-party monitoring services." Id. ¶ 199. There was no such agreement between the EDC and IBM. Id. ¶ 201.

G

The Travel of the Case

"38 Studios was unable to complete Copernicus and ran out of cash in 2012." Id. ¶ 144. "As a result, 38 Studios defaulted on the loan from the EDC and filed for liquidation in bankruptcy." Id. This action was filed on November 1, 2012, and the EDC amended its Complaint on November 16, 2012. All of the Defendants moved to dismiss the case, and the EDC opposed those motions.[6] The parties submitted approximately 1500 pages of documents supporting their motions and oppositions, including over 750 pages of legal argument. The Court held two full days of oral argument.

On August 22, 2013, the Court held another argument regarding the EDC's "Motion Requesting the Court to Take Judicial Notice" of the General Assembly's appropriation of $2.5 million to the Capital Reserve Fund, the "Opposition to and Motion to Strike" part of the EDC's motion filed by twelve of the fourteen Defendants, and Moses Afonso's separate "Response" to the EDC's motion, which really amounted to additional argument on the initial Motion to Dismiss and a request for the Court to take judicial notice of the last six years of financial statements filed by the EDC. At that hearing, the Court granted the EDC's motion, without objection, to the extent that it requested that the Court take judicial notice of Rhode Island Public Laws ch. 13-144, AN ACT RELATING TO MAKING APPROPRIATIONS FOR THE

[6] The EDC and Starr stipulated to the dismissal without prejudice of Count VIII as to Starr. (Pl.'s Mem. in Opp'n 199.)

SUPPORT OF THE STATE FOR THE FISCAL YEAR ENDING JUNE 30, 2014, which was passed by the General Assembly and signed by the Governor on July 3, 2013.[7] The Court did not rule from the Bench on Moses Afonso's Response. The Court denies Moses Afonso's request that the Court consider the EDC's financial statements because the accuracy of their contents can reasonably be questioned.[8] See R.I. R. Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."). The financial statements may be appropriate evidence on a Motion for Summary Judgment or at trial; however, they are not appropriate to consider via judicial notice on a Motion to Dismiss.

II

Standard of Review

The Defendants have moved to dismiss the EDC's Complaint under both Super. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction) and Super. R. Civ. P. 12(b)(6) (failure to state a claim upon which relief can be granted). They assert that issues of standing and ripeness should be resolved under Rule 12(b)(1), while the EDC asserts that Rule 12(b)(6) governs all issues in the Defendants' motions. Some courts do consider justiciability issues under Rule 12(b)(1). See, e.g., Faibisch v. University of Minnesota, 304 F.3d 797, 801 (8th Cir. 2002) (noting that "a standing argument implicates Rule 12(b)(1)"); Valentin v. Hospital Bella Vista, 254 F.3d 358, 362 (1st Cir. 2001) ("The proper vehicle for challenging a court's subject-matter jurisdiction is Federal Rule of Civil Procedure 12(b)(1)."); Ernst & Young v. Depositors Economic Protection Corp., 45 F.3d 530, 541 (1st Cir. 1995) (affirming dismissal on ripeness grounds for lack of

[7] Although the Plaintiff only attached a certified copy of Article 1 to its motion, the Court takes judicial notice of the entire Act (Articles 1-25). See infra Sec. III.A.2.e.

[8] Counsel should present an order on these judicial notice issues consistent with the Court's ruling at the hearing and in this section of this Decision.

subject matter jurisdiction). However, when the Rhode Island Supreme Court recently held that a plaintiff lacked standing, the Court explicitly affirmed the trial justice's dismissal under Rule 12(b)(6). See Watson v. Fox, 44 A.3d 130, 138-39 (R.I. 2012). Therefore, this Court will consider the motions under Rule 12(b)(6).[9]

"The sole function of a motion to dismiss is to test the sufficiency of the complaint." Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 277 (R.I. 2011) (citations omitted). The Court must "assume the allegations contained in the complaint are true, and examine the facts in the light most favorable to the nonmoving party." A.F. Lusi Constr., Inc. v. R.I. Convention Ctr. Auth., 934 A.2d 791, 795 (R.I. 2007) (citations omitted). Accordingly, the Court's function is to "examine the complaint to determine if plaintiffs are entitled to relief under any conceivable set of facts." McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005). This analysis requires a resolution to questions of justiciability. See id.

The pleading must give fair and adequate notice of the plaintiff's claim, but need not contain a "high degree of factual specificity."[10] See Hyatt v. Village House Convalescent Home, Inc., 880 A.2d 821, 824 (R.I. 2005). A court should grant a Rule 12(b)(6) motion only "when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the

[9] As the Defendants note, the subsection of the rule does not change this Court's ripeness analysis. See Defs.' Joint Reply Mem. 3 n.1. A common distinction between the subsections is that Rule 12(b)(1) is typically more searching in scope because it allows the court to consider documents outside the complaint. See Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002) ("While the court generally may not consider materials outside the pleadings on a Rule 12(b)(6) motion, it may consider such materials on a Rule 12(b)(1) motion . . . ."). That distinction, however, is not material here, as any documents submitted as exhibits to the memoranda and relied on in this Decision are considered on this Motion to Dismiss because they are explicitly relied on and integral to the Complaint. See Rhode Island Resource Recovery Corp. v. Van Liew Trust Co., No. PC-10-4503, filed May 13, 2011, Silverstein, J., at 10 n.5.

[10] The circumstances constituting fraud, however, must be stated with particularity. Super. R. Civ. P. 9(b). Even still, "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." Id.

defendant under any set of facts that could be proven in support of the plaintiff's claim." Palazzo v. Alves, 944 A.2d 144, 149-50 (R.I. 2008) (quoting Ellis v. R.I. Pub. Transit Auth., 586 A.2d 1055, 1057 (R.I. 1991)). The Rhode Island Supreme Court continues to ascribe to this traditional notice pleading standard and has not formally adopted (or rejected) the newer, federal standard on a motion to dismiss, as set forth in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009). See Narragansett Elec. Co., 21 A.3d at 277 (applying traditional Rhode Island standard more than two years after the United States Supreme Court decided both Twombly and Iqbal). But see Rosano v. MERS et al., No. PC-2010-0310, June 19, 2012, Rubine, J., at 4-6, 10 (dismissing complaint under Twombly and Iqbal); Siemens Fin. Servs., Inc. v. Stonebridge Equip. Leasing, LLC, No. PB-2009-1677, Nov. 24, 2009, Silverstein, J., at 5 (noting that Rhode Island Supreme Court's "overall approach in analyzing a 12(b)(6) motion does not conflict with the holding in [Iqbal] that a complaint that includes well-pleaded factual allegations and a plausible claim for relief should survive a motion to dismiss"). Therefore, this Court will apply the traditional Rhode Island standard.

III

Discussion

The Defendants have asserted a myriad of grounds for dismissal. They range from theories that, if accepted, would dismiss all counts as to all Defendants to theories that only apply to a single count against a single Defendant. The Plaintiff responded with a throng of reasons why all of the Defendants' arguments fail. The Court will address the global issues first and then proceed to the Defendants' more individualized arguments.

A

The Sufficiency of the Alleged Injury and Relief Sought

Thirteen of the sixteen counts in the Complaint allege the same four injuries:

> "a. The EDC lost the $75 million it loaned to 38 Studios and instead will receive at most a small fraction thereof from the bankruptcy and receivership proceedings;
>
> b. The EDC will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders;
>
> c. Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million; and
>
> d. Defendants' conduct injured the EDC's reputation and credit." (Compl. Counts I-IX, XI-XIV.)

The EDC seeks other forms of relief in its other three counts: a mandatory final injunction, restitution, and a declaratory judgment. (Compl. Counts X, XV-XVI.) Furthermore, in its Memorandum of Law in Opposition to All Defendants' Motions to Dismiss the First Amended Complaint, the EDC identifies additional theories of damages and relief. All Defendants assert that the Complaint should be dismissed because the EDC has not suffered a legally cognizable injury. The thrust of the Defendants' argument on this point is that the EDC's primary damages theories are not ripe for judicial review; however, arguments on standing, causation, and inadequate pleading are also intertwined here.

1

Declaratory Judgment

Count XVI requests "a declaratory judgment declaring that [all Defendants], jointly and severally, are liable to Plaintiff on the causes of action set forth herein, even if the exact quantum of Plaintiff's damages cannot yet be determined due to these future contingencies." (Compl.

¶ 301.) The Court will treat this count as a request for declaratory relief on all other counts, rather than a claim in and of itself.

Although Wells Fargo argues that this claim for a declaratory judgment "must be dismissed because it is not a proper way to recover damages," the declaratory relief requested by the EDC does not seek money damages. (Wells Fargo Mem. in Supp. 22.) It seeks a declaration of liability. (Compl. ¶ 301.) Any recovery of money subsequent to a declaratory judgment, if ultimately granted, would require proof that the recovery of that money flows from the declaration. While the Uniform Declaratory Judgments Act (UDJA) "'render[s] disputes concerning the legal rights and duties of parties justiciable without proof of a wrong committed by one party against another,'" it does not require proof that no wrong has been committed. Chase v. Mousseau, 448 A.2d 1221, 1224 (R.I. 1982) (quoting Millett v. Hoisting Engineers' Licensing Division of the Department of Labor, R.I., 119 R.I. 285, 291, 377 A.2d 229, 233 (1977)) (emphasis added by Chase). The necessary predicate to the Court's jurisdiction under the UDJA is set out below. Neither the justiciable controversy requirement nor the statute itself extracts presently existing wrongs from the purview of the UDJA. See 9-30-1 et seq.; Millet, 119 R.I. at 291, 377 A.2d at 233. Furthermore, "[i]n light of their highly remedial nature then, declaratory judgment statutes should be liberally construed; they should not be interpreted in a narrow or technical sense." Millet, 119 R.I. at 291, 377 A.2d at 233. Finally, although Wells Fargo argues that declaratory judgments cannot adjudicate past conduct and that Wells Fargo has no ongoing relationship with the EDC to adjudicate, this case relates to more than past conduct because of the nature of the bond payments, which extend for another seven years.[11] See Compl. ¶ 146 (2020 Term Bonds due Nov. 1, 2020).

"[A] necessary predicate to a court's exercise of its jurisdiction under the Uniform Declaratory Judgments Act is an actual justiciable controversy." Meyer v. City of Newport, 844 A.2d 148, 151 (R.I. 2004). "Without making this initial determination, the court does not have jurisdiction to entertain the claim." N & M Properties, LLC v. Town of West Warwick, 964 A.2d 1141, 1144-45 (R.I. 2009) (citations omitted). "For a claim to be justiciable, two elemental components must be present: (1) a plaintiff with the requisite standing and (2) some legal hypothesis which will entitle the plaintiff to real and articulable relief." Id. at 1145.

a

Requisite Standing and Ripeness

"The standing inquiry is satisfied when a plaintiff has suffered 'some injury in fact, economic or otherwise.'" Id. Injury in fact has been defined as "an invasion of a legally protected interest which is (a) concrete and particularized * * * and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Id. Although N & M Properties framed the first prong as a question of "requisite standing," given that the overall test is one of justiciability, and ripeness is a justiciability doctrine, the Court will also apply ripeness principles here. See Watson v. Fox, 44 A.3d 130, 135 n.12 (including standing and ripeness in list of "specific categories of justiciability"). "As a general rule, a claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" State v. Gaylor, 971 A.2d 611, 614-15 (R.I. 2009) (quoting Thomas v. Union Carbide Agricultural Products Co.,

[11] Indeed, the Defendants seek dismissal on ripeness grounds, which, by its very nature, is an argument that there is an ongoing issue that may, or may not, require court intervention in the future.

473 U.S. 568, 580-81 (1985) (quoting 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3532 at 112 (1984))). Thus, to meet this prong, the Complaint must allege an injury that is concrete and particularized, actual or imminent, but not conjectural, hypothetical, or resting upon future events. See Gaylor, 971 A.2d at 614-15; N & M Properties, 964 A.2d at 1145.

The injury is particularized to the EDC because all of the Defendants served or dealt with the EDC, not the bondholders, the General Assembly, or an insurance company. The body allegedly deceived is the EDC Board and no one else. There is a concrete and at least imminent injury here because the allegedly liability-causing acts are over, and the General Assembly has appropriated money to pay the bondholders. See Pub. Laws ch. 13-144, art. 1, § 1, at 4 ("Of the general revenue appropriation for debt service, two million five hundred thousand dollars ($2,500,000) is appropriated for transfer to the Capital Reserve Fund of the EDC Job Creation Guaranty Program.") The relevant events in the future will relate to the amount of damages, not whether damages are incurred. Section 42-64-18(5) governs the relationship between the EDC and the State when the state appropriates money to pay EDC bonds:

> "All amounts paid over to the corporation by the state pursuant to the provisions of this section shall constitute and be accounted for as advances by the state to the corporation and, subject to the rights of the holders of any bonds or notes of the corporation issued before or after, shall be repaid to the state without interest from all available operating revenues of the corporation in excess of amounts required for the payment of bonds, notes, or other obligations of the corporation, the capital reserve funds and operating expenses[.]"

This section can be separated into two concepts: the fact of an advance by the State and the method by which the EDC would have to repay the State. As the General Assembly has appropriated money to pay the bonds, a payment to the EDC is imminent and that payment "shall constitute and be accounted for as [an advance] by the state to the corporation." Id. Thus the advance is an actual or imminent injury to the EDC. The method of repayment, i.e., from operating revenues in excess of the listed amounts, only quantifies the amount that the EDC must pay back. While some have argued that there is still no injury because the State would be a volunteer in making the payment, the statute does not so distinguish. Section 42-64-18(5) applies to "[a]ll amounts paid over to the corporation"; not to all involuntary amounts. Id. The Defendants assert that the EDC may not use the UDJA to obtain an advisory opinion. See Defs.' Joint Mem. in Supp. 15-16; Defs.' Joint Reply Mem. 8-10. To be sure, future conduct, in particular the amount that the EDC would be required to repay the State by statute, will have an effect on the precise amount of damages that the EDC may claim under this theory. But the facts alleged show that the EDC has alleged a sufficient injury that (pending analysis of the claims below) could result in a declaration of liability with the injury discussed above, while awaiting further facts to define the precise quantum of injury.

b

Legal Hypothesis Which Will Entitle the Plaintiff to Real and Articulable Relief

In N & M Properties, the Court laid out the following paragraph on the second elemental component of a justiciable controversy:

> "The second requirement for justiciability is that 'the facts postulated yield to some conceivable legal hypothesis which will entitle the plaintiff to some relief against the defendant.' Goodyear Loan Co. v. Little, 107 R.I. 629, 631, 269 A.2d 542, 543 (1970) (citing 1 Anderson, Actions for Declaratory Judgments § 14 at 59 (2d ed. 1951)). A well-respected treatise has explained that '[w]here a concrete issue is present and there is a definite assertion of legal rights coupled with a claim of a positive legal duty with respect thereto which shall be denied by adverse party, then there is a justiciable controversy calling for the invocation of the declaratory judgment action.' 1 Anderson, § 14 at 62. If the court determines that there is no justiciable controversy, 'the court can go no further, and its immediate duty is to dismiss the action * * *.' Id., § 9 at 49-50."

N & M Properties, 964 A.2d at 1145-46. Despite adding depth to this second prong of the test, the Court resolved N & M Properties on the first prong, holding that the plaintiff lacked standing. Id. at 1145-46. Thus, it did not apply the facts of the case to this analytical framework. Id.

The first sentence of the analysis—"The second requirement for justiciability is that 'the facts postulated yield to some conceivable legal hypothesis which will entitle the plaintiff to some relief against the defendant.' Goodyear Loan Co. v. Little, 107 R.I. 629, 631, 269 A.2d 542, 543 (1970) (citing 1 Anderson, Actions for Declaratory Judgments § 14 at 59 (2d ed. 1951))"—has been part of Rhode Island's jurisprudence since at least 1970. But the second sentence—"A well-respected treatise has explained that '[w]here a concrete issue is present and there is a definite assertion of legal rights coupled with a claim of a positive legal duty with respect thereto which shall be denied by adverse party, then there is a justiciable controversy calling for the invocation of the declaratory judgment action.' 1 Anderson, § 14 at 62."—only seems to have become part of the formula in 2009. See N & M Properties, 964 A.2d at 1145-46. While these two concepts are not directly connected in the treatise cited (they are three pages apart), they have been joined by the Rhode Island Supreme Court in its declaratory judgment jurisprudence. However, no Rhode Island Supreme Court case appears to have applied the second sentence of the analysis to a factual situation.[12]

Applying these tenets to our case, the legal hypothesis is that the Defendants are liable for the acts in the other counts. If proven, the EDC may be entitled to recover the amount that it

[12] In Warwick Sewer Authority v. Carlone, 45 A.3d 493, 498-500 (2012), the Supreme Court concluded an actual justiciable controversy existed. After quoting from N & M Properties, the Court stated, "Because Mr. Carlone does not assert that the second requirement of justiciability has not been met, we simply highlight that plaintiffs, in their complaint for declaratory relief, have presented sufficient facts giving rise 'to some conceivable legal hypothesis which will entitle [them] to some relief against' Mr. Carlone." Id. at 500 (quoting N & M Properties, 864 A.2d at 1145). Without more information about the relevant facts in Warwick Sewer, this Court cannot analogize that case to this one.

pays over to the State to satisfy the advance made by the State as described above. Given that the liability-causing acts are now in the past, the issue is concrete; further, the EDC has asserted its legal rights under the other claims coupled with the assertion that the Defendants would have a duty to reimburse the money paid by the EDC to the State. Through their arguments on this Motion, the Defendants have denied that they have such a duty to reimburse. The real and articulable relief would be a declaration that the Defendants are liable for the claims proved and that the amount is the amount ultimately paid by the EDC to the State. For these reasons, the Complaint meets the second prong of the actual justiciable controversy analysis.

The EDC has a viable claim for declaratory judgments as to liability on Counts I-XV, pending the analysis that follows.

2

Alleged Damages

a

The Basic Arguments of the Parties

The Defendants point to the conditional statements in the EDC's Complaint and Memorandum in Opposition to attack the justiciability of the EDC's Complaint. Additionally, the Defendants attack the but-for causation of some damage claims and the pleading sufficiency of others. The EDC points to a smorgasbord of injuries that it claims are concrete and sufficiently pled.

b

Relevant Legal Principles

As noted above, the Court must be presented with a justiciable controversy to proceed. See Watson, 44 A.3d at 135. "Justiciability is itself a concept of uncertain meaning and scope."

Flast v. Cohen, 392 U.S. 83, 95 (1968); see also Watson, 44 A.3d at 135 (noting the discussion of justiciability and standing in Flast). "'[J]usticiability is * * * not a legal concept with a fixed content or susceptible of scientific verification.'" Flast, 392 U.S. at 95 (quoting Poe v. Ullman, 367 U.S. 497, 508 (1961)).

"[T]he problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability," and standing has been referred to as "one of the must amorphous (concepts) in the entire domain of public law." Flast, 392 U.S. at 98-99 (citations omitted). The test for standing requires that the plaintiff "allege 'that the challenged action has caused him injury in fact, economic or otherwise.'" (quoting Rhode Island Ophthalmological Society v. Cannon, 113 R.I. 16, 22, 317 A.2d 124, 128 (1974)). As noted above, that injury must be concrete and particularized and actual or imminent, but not conjectural or hypothetical. Watson, 44 A.3d at 135-36. Additionally, a claim must be ripe for judicial review. See Gaylor, 971 A.2d at 614-15. "[A] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Id. (citations omitted).

Superior Court Rules of Civil Procedure 8(a) requires "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for relief the pleader seeks." A pleading "need not include the ultimate facts that must be proven in order to succeed on the complaint * * * [or] * * * set out the precise legal theory upon which his or her claim is based"; the rule merely requires "fair and adequate notice of the type of claim being asserted."" Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009) (citations omitted).

Finally, "[t]ortious conduct must be a factual cause of harm for liability to be imposed." Restatement (Third) of Torts—Liability for Physical and Emotional Harm § 26. "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct." Id. A recent

Rhode Island Supreme Court opinion noted that in an action sounding in negligence, the plaintiff must establish that "'there was a causal relation between the act or omission of the defendant and the injury to the plaintiff.'" Almonte v. Kurl, 46 A.3d 1, 18 (R.I. 2012) (quoting Schenck v. Roger Williams General Hospital, 119 R.I. 510, 514, 382 A.2d 514, 516–17 (1977)). The Court further expressed the causation standard by stating the following:

> "A plaintiff must not only prove that a defendant is the cause-in-fact of an injury, but also must prove that a defendant proximately caused the injury. Indeed, the word proximate, in the legal context of proximate cause, requires a factual finding that the harm would not have occurred but for the act and that the harm was a natural and probable consequence of the act.
>
> * * *
>
> To prove proximate cause, a plaintiff must establish the required causal relationship by competent evidence. In most cases, proximate cause may be demonstrated by establishing that the harm to the plaintiff would not have occurred but for the defendant's negligence."

Id. (citations and alterations omitted).

c

Loss of $75 million

The EDC alleges in its Complaint that it lost the $75 million that it loaned to 38 Studios. See Compl. ¶ 219a. The Defendants assert that the 38 Studios transaction did not cause the EDC to lose $75 million. Causation principles are described above.

The 38 Studios transaction, as described in the Complaint, could not have caused the EDC to lose $75 million. The Complaint explicitly states that "[t]his was conduit financing." Compl. ¶ 23; see also ¶ 77 (noting that "the Bonds were conduit bonds"). The bondholders, not the EDC, put up $75 million. The Bond PPM makes it clear that the proceeds of the Bonds were to go to 38 Studios and serve the financing of that specific project:

> "The 2010 Bonds are being issued by the Issuer under the Issuer Act and in connection with the Job Creation Guaranty Program created under the Act in order to promote the retention and expansion of businesses and the creation of jobs in the State of Rhode Island (the "State")[.] The proceeds of the 2010 Bonds will be loaned by the Issuer to the Company <u>for the purpose of financing (i) the relocation of the Company's corporate headquarters and primary place of business to the State and (ii) the establishment and operation by the Company of a video gaming studio in the City of Providence, Rhode Island</u>, including, but not limited to costs and expenses related to the development of assets associated with role playing video gaming and massively multiplayer games, and the development of specific products to be used for such purposes, <u>(iii) the funding of the Capital Reserve Fund and the Capitalized Interest Fund as provided in the Agreement, and (iv) paying costs of issuance of the 2010 Bonds (the "Project")</u>[.]"

(Bond PPM, at 1 (emphasis added)). There is no allegation in the Complaint that the money that flowed through the EDC in this transaction could ever have been used for any purpose other than the 38 Studios transaction. Had the 38 Studios transaction never occurred, the only reasonable inference would be that the EDC never would have issued this $75 million in bonds; indeed, $75 million never would have been raised. Finally, regardless of whatever interest the EDC claims in bond proceeds, the EDC "irrevocably assign[ed]" to the Trustee "all of [its] right, title and interest" in the Loan and payments thereon, the moneys and securities held by the Trustee in the various funds, the Trust estate, and any collateral security and proceeds of those things. (Loan and Trust Agreement § 2.02A.)

Therefore, the Court finds that it is clear beyond a reasonable doubt that the EDC cannot recover a $75 million loss from the Defendants because it did not lose $75 million in the transaction; it was merely a conduit. <u>See</u> <u>Palazzo</u>, 944 A.2d at 149-50.

d

The EDC's Liability for the General Assembly's Appropriation of Funds

The EDC contends that it "will be liable to reimburse the State of Rhode Island if the General Assembly appropriates funds to enable the EDC to pay the bondholders." (Compl. ¶ 219b.) The Defendants argue primarily that this claim is not yet ripe for judicial review, but they also include arguments traditionally associated with standing principles.

This issue has already been discussed, supra, in the declaratory judgment context. The justiciability principles discussed there also apply outside of the declaratory judgment context. To the extent that the legislature has appropriated money ($2.5 million), the claim is actual, given that the appropriation constitutes an advance, and damage to the EDC is imminent. To the extent that the EDC seeks recovery for monies that have yet to be appropriated, that recovery is still conjectural; however, the EDC may have a claim for a declaratory judgment that would apply to those payments.

e

The EDC's Reduced Ability to Issue Bonds

The EDC alleges that "Defendants' conduct reduced the EDC's ability to issue bonds or other guaranties under the Jobs Creation Guaranty Fund from $125 million to $50 million." (Compl. ¶ 219c.) In its memorandum, to support this claim for relief, the EDC states, "By issuing the $75 million in bonds to finance 38 Studios, the EDC's bonding authority was reduced by that amount, and it will not be restored until the bonds are repaid." (Pl.'s Mem. in Opp'n 65 (citing Compl. ¶ 74 (quoting 2010 Public Laws 026/029))). Thus, this argument relies on the EDC's allegation in its Complaint that the Public Laws provide:

> "Under the program, the corporation may from time to time issue its bonds, guaranty debt service thereon or on bonds issued by the

> Rhode Island industrial facilities corporation, or guaranty the debt service of another provided that the principal amount of bonds or other obligations guaranteed pursuant to the program shall not at any time exceed one hundred twenty-five million dollars ($125,000,000) . . . ."

(Compl. ¶ 74.) However, the General Assembly has now repealed the Jobs Creation Guaranty Program. Pub. Laws ch. 13-144, art. 24, § 1 ("Section 1 of Chapter 26 of the 2010 Public Laws entitled 'AN ACT RELATING TO ECONOMIC DEVELOPMENT' is hereby repealed."); § 2 ("Section 1 of Chapter 29 of the 2010 Public Laws entitled 'AN ACT RELATING TO AUTHORIZING THE ECONOMIC DEVELOPMENT CORPORATION TO CREATE THE JOB CREATION GUARANTY PROGRAM' is hereby repealed."); § 3 ("This article shall take effect upon passage."). Thus, the EDC's request that its bonding authority be restored is moot because its bonding authority under the Jobs Creation Guaranty Program no longer exists. See City of Cranston v. Rhode Island Laborers' Dist. Council Local 1033, 960 A.2d 529, 533 (R.I. 2008) ("If this Court's judgment would fail to have a practical effect on the existing controversy, the question is moot . . . ."). Accordingly, the EDC does not have a viable claim for damage to its ability to issue bonds.

f

The EDC's Reputation and Credit

The EDC contends that "Defendants' conduct injured the EDC's reputation and credit." (Compl. ¶ 219d.) The Defendants argue that this pleading of reputation and credit damages is inadequate.

While the entirety of the EDC's allegation on reputation and credit damages is "Defendants' conduct injured the EDC's reputation and credit," this bald statement is sufficient to survive a Motion to Dismiss. The Defendants' argument on this point relies heavily upon an application of the formulation of the standard espoused in Bell Atlantic Corp. v. Twombly, 550

U.S. 544 (2007). See Defs.' Joint Mem. in Supp. 13-14; Defs.' Joint Reply Mem. 14-16. As noted above, the Rhode Island Supreme Court has not accepted this description of the Motion to Dismiss standard. See Narragansett Elec. Co., 21 A.3d at 277. The Rhode Island standard only requires fair and adequate notice of the plaintiff's claim and that the claim may entitle the plaintiff to relief under any conceivable set of facts. See id.; McKenna, 874 A.2d at 225.

Here, the Complaint gives to the Defendants notice that the EDC seeks to recover for alleged injuries to its reputation and credit. The EDC could conceivably show that its reputation has been harmed as a result of the alleged misdeeds of the Defendants in this transaction, although the method of quantification of that harm into a number higher than $0 may be difficult. Further, the EDC could conceivably put forth evidence that its credit has been adversely affected by the 38 Studios transaction. But whether the EDC will be able to prove any quantifiable damage to its reputation or credit—particularly in light of its admission that appropriation by the General Assembly "may forestall or avoid injuries to the EDC's reputation and credit"—is not for this Court to determine at the Motion to Dismiss stage. (Pl.'s Mem. in Opp'n 67 n.39.) Accordingly, the Court finds that the EDC's allegation of reputation and credit damage is sufficient to withstand the Motion to Dismiss.

g

The EDC's Obligation to Make Bond-Service Payments

The EDC contends that its "obligation to make bond-service payments constitutes damages." (Pl.'s Mem. in Opp'n 52.) To support this argument, the EDC alleges that "[t]he Trustee, Bondholders, or Insurer can obtain a judgment against the EDC in the full accelerated amount of any unpaid bond-service payments." Id. The EDC further stresses that "a judgment is debt," and a debt would be damages, even if execution is limited. Id. at 58. The Defendants assert that this claim is not ripe because there is no judgment or debt at this time.

The Court agrees with the Defendants that this claim for damages is not ripe for adjudication at this time. Underlying this entire argument is an Event of Default (and the events or non-events that would need to occur for an Event of Default to occur). It is only an Event of Default that could result in a judgment against the EDC, and no such default has happened. For an event of default to occur, bond-service payments would have to be missed. The contingent nature of this claim is clear from the various uses of conditional language by the EDC.[13] In affirming a dismissal on ripeness grounds, the First Circuit has noted that the plaintiff's challenge to a statute "lack[ed] the needed dimensions of immediacy and reality" and was "not rooted in the present, but depend[ed] on a lengthy chain of speculation as to what the future has in store." Ernst & Young v. Depositors Economic Protection Corp., 45 F.3d 530, 538 (1st Cir. 1995) (Selya, J.). Similarly, here, a chain of events would have to occur for the EDC to be subject to a judgment. Additionally, with the appropriation of money for the May 2014 debt service by the General Assembly, the earliest that a possible Event of Default could occur is more than a year away, in November 2014. Thus, this Court cannot say that an injury of this type—a judgment against the EDC—is actual or imminent. See Watson, 44 A.3d at 135-36. Furthermore, it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Gaylor, 971 A.2d at 614-15 (citations omitted).

[13] See, e.g., Pl.'s Mem. in Opp'n 53 ("[I]f any single payment of bond service is missed, a judgment may be obtained . . ."); 55 ("If the State fails to provide the EDC with funds . . ."); 56 ("Following an Event of Default, the Trustee (or the bondholders or Insurer) may sue the EDC . . ."); 58 ("[I]f the Trustee has insufficient funds and fails to pay principal or interest on behalf of the EDC, and the Insurer makes that payment . . .") (emphases added).

This situation is different than the theories approved above concerning the payments appropriated by the General Assembly. First, an appropriation has been made, which, as a practical matter, has made at least one payment imminent and conversely has pushed back the first possibility of an Event of Default. Additionally, once the General Assembly's appropriation is made, it constitutes and is accounted for as an advance to the EDC by the State pursuant to statute. See § 42-64-18(5). After an Event of Default, another entity would still have to make the choice to seek a judgment against the EDC, pursuant to the Loan and Trust Agreement or other contractual relations (and succeed in obtaining such a judgment).

Therefore, the Court concludes that the EDC's current claim for possible future obligation for bond-service payments is not ripe. The Court notes, however, that this finding is obviously without prejudice. If, in the future, the EDC becomes subject to a judgment, or such a judgment is imminent, the EDC is not precluded from seeking those damages at that time.

h

The Fees and Salaries Paid to the Defendants

The EDC contends that it is entitled to recover fees and salaries that it paid to the Defendants. The Defendants contend that the EDC does not have standing to seek disgorgement because the fees were paid out of the bond proceeds.

"Disgorgement is a traditional equitable remedy for breach of fiduciary duty." Rhode Island Resource Recovery Corporation v. Van Liew Trust Company, et al., No. PB 10-4503, filed Nov. 5, 2012, Silverstein, J., at 14. The EDC has alleged a breach of fiduciary duty against all Defendants to whom it paid fees or salaries. See Compl. Count I. Thus, it is entitled to seek disgorgement of those fees and salaries. Although the fees may have come out of the bond proceeds, the contractual arrangements were between the EDC and the various Defendants, i.e., First Southwest was the financial advisor to the EDC, and the other professional service defendants provided services to the EDC. Thus, the EDC may presently seek to disgorge the amounts paid for the services allegedly performed in breach of trust.[14] Furthermore, Stokes and Saul's salaries were presumably paid by the EDC with money not from the 38 Studios transaction. Therefore, the EDC may seek to recover the fees and salaries paid to the Defendants.

The Defendants also contend that Count XV (Unjust Enrichment) fails to state a claim. "To recover for unjust enrichment, a claimant must prove: (1) that he or she conferred a benefit upon the party from whom relief is sought; (2) that the recipient appreciated the benefit; and (3) that the recipient accepted the benefit under such circumstances 'that it would be inequitable for [the recipient] to retain the benefit without paying the value thereof.'" Dellagrotta v. Dellagrotta, 873 A.2d 101, 113 (R.I. 2005) (quoting Bouchard v. Price, 694 A.2d 670, 673 (R.I. 1997)). Defendants argue that there is no allegation that a benefit was conferred on the Defendants by the EDC because the fees were paid out of the bond proceeds. As with disgorgement, the method of payment is not dispositive. It was through their arrangements with the EDC, not the bondholders, that the Defendants received fees and salaries. Thus, it is possible for the Plaintiff to prove that it conferred the benefit on the Defendants by agreeing to their fees, even though the money came out of the bond proceeds. See McKenna v. Williams, 874 A.2d at 225 (complaint need only state a claim under "any conceivable set of facts"). Unjust enrichment does not require that the plaintiff suffer monetary loss, it requires that the retention of the benefit received be inequitable. See Dellagrotta, 873 A.2d at 113.

[14] While the EDC may seek recovery, if the EDC obtains a judgment, where the payment must then go may be subject to other provisions in the relevant agreements.

3

The EDC's Enforcement Powers and Injunctive Relief

The EDC argues very broadly that this suit would not be barred even in the complete absence of pecuniary damages because the suit is brought pursuant to its statutory enforcement powers. Section 42-64-9.3(a) provides:

> "Whenever, on the basis of any information available to the corporation, the corporation has reasonable grounds to believe that a person has violated any provision of this chapter or of any permit, rule, regulation or order issued pursuant to this chapter the corporation may institute administrative, civil or criminal proceedings in the name of the Rhode Island economic development corporation. The corporation shall not be required to enter into any recognizance or give surety for costs prior to instituting this proceeding."

While this statute permits the EDC to "institute" a civil proceeding, it does not change the elements of any cause of action alleged, i.e., it does not speak to the corporation's ability to bring civil law suits without suffering damages.

The next section of the statute does give the EDC some added leeway from that of an ordinary civil litigant; it provides that the EDC need not establish two ordinary prerequisites to obtaining injunctive relief:

> "The superior court for Providence county shall have jurisdiction to enforce the provisions of this chapter and any rule, regulation, permit or administrative order issued pursuant to this chapter. Proceedings for enforcement may be instituted and prosecuted in the name of the corporation. In any proceeding on which injunctive relief is sought, it shall not be necessary for the corporation to establish that without the relief the injury, which will result will be irreparable or that the remedy at law is inadequate. Proceedings provided in this section shall be in addition to, and may be utilized in lieu of, other administrative or judicial proceedings authorized by this chapter."

Sec. 42-64-9.3(b). Nevertheless, Count X—"Mandatory Final Injunction Pursuant to EDC Enforcement Powers"—

is not a proper claim for relief. "'[I]njunctive relief is not an independent cause of action; rather, "injunctive relief is a remedy and, cannot, in itself, be recognized as a substantive claim.'" F. Saia Restaurants, LLC v. Oat's Italian Food to Go, Inc., No. PB-12-1294, filed June 5, 2012, Silverstein J., at 10 (quoting State v. Lead Indus. Ass'n, Inc., No. 99-5226, 2001 WL 345830, at *17 (R.I. Super. Apr. 2, 2001) (Silverstein, J.)). An injunction is "[a] court order commanding or preventing an action." Black's Law Dictionary 855 (9th Ed. 2009). Therefore, Count X fails to state a claim upon which relief may be granted because it does not allege a cause of action. Accordingly, Count X is dismissed. This dismissal, however, is without prejudice to the EDC's right to request leave to amend its Complaint to seek an injunction as a remedy to other claims.[15]

4

Summary of Conclusions on the Sufficiency of the Alleged Injury and Relief Sought

To the extent that the EDC seeks to recover for (1) a $75 million loss on the loan to 38 Studios, (2) its reduced ability to issue bonds, and (3) a possible future obligation to make bond service payments, the Complaint fails to state a claim upon which relief can be granted for the reasons set forth above. Additionally, Count X is dismissed because it does not assert a cause of action; injunctive relief is only a remedy. This dismissal is without prejudice.

To the extent that the EDC seeks to recover for (1) its liability for the General Assembly's appropriation of funds, (2) injury to its reputation and credit, and (3) its payments of salaries and fees to the Defendants, the Complaint does state a cause of action for the reasons set forth above. Additionally, the EDC's request for a Declaratory Judgment survives as to all remaining Counts.

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[15] Unlike the Declaratory Judgment count, which incorporated the other counts, Count X sought injunctive relief in and of itself.

B

Imputation

Imputation is a legal doctrine whereby an agent's knowledge is attributed to the principal. Imputation is closely intertwined with agency law, particularly in the corporate setting because "[a] corporation cannot see or know anything except by the eyes or intelligence of its officers; a corporate body, as a legal entity, cannot itself have knowledge." 3 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 787 (2010); see Brimbau v. Ausdale Equipment Rental Corp., 440 A.2d 1292, 1295 (R.I. 1982) (approving of jury instruction that "a corporation acts only through its officers, agents, and employees, who in turn bind the corporation by the acts they commit or the knowledge they obtain when furthering the business of the corporation"). In this case, First Southwest and other Defendants[16] seek to impute the knowledge of EDC's Officers (including co-Defendants Stokes and Saul) to the corporation. Under such a theory, the EDC would be held to know what the Complaint alleges that the EDC Board did not know. Thus, imputation would defeat all counts involving misrepresentation and deceit because the corporation could not have been misled by nondisclosure of information that the corporation itself knew.

[16] First Southwest presented the primary argument on imputation. It appears that all Defendants other than Stokes have presented an imputation argument either on their own or by joining another memorandum.

1

Imputation Principles

a

The General Rule and Third Party Limitation

Corporate officers are agents of a corporation (the principal). "Notice of a fact that an agent knows or has reason to know is imputed to the principal as stated in §§ 5.03 and 5.04." Restatement (Third) of Agency § 5.01 (2006). Most directly applicable to this case, the Restatement states, "For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal . . . ."[17] Id. § 5.03. This rule applies whether or not the officer or agent actually passes on the knowledge to the principal. See id. § 5.03 cmt. b.; Fletcher, supra, § 790.

The rule of imputation of a corporate officer or agent's knowledge to the corporation itself has been enshrined in Rhode Island's corporate law for over one hundred years. In Cook v. American Tubing and Webbing Co., 28 R.I. 41, 65 A. 641, 655 (1905), the Rhode Island Supreme Court stated that "upon grounds of public policy . . . a corporation shall be held responsible for the knowledge which is possessed by those whom it appoints to represent it."[18] The Court went on to say:

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[17] The ellipsis omits "unless the agent (a) acts adversely to the principal as stated in § 5.04, or (b) is subject to a duty to another not to disclose the fact to the principal." Id. Subsection (a) is discussed here as the Adverse Interest Exception and subsection (b) does not apply to this case.

[18] Indeed, a United States Supreme Court case described such a principle of agency law in 1870:

> "The general rule that a principal is bound by the knowledge of his agent is based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty."

> "From the nature of its constitution it can have no other knowledge than that of its officers, and in dealing with such officers, as with the corporation itself, third parties have a right to consider that what they know it knows. Indeed, when the presiding officer of a corporation is intrusted [sic] with the transaction of its business, with full power to bind the corporation in respect to such business, it seems more proper to call the knowledge which he has actual knowledge of the corporation rather than to say it is imputed."[19]

Id. This rule has also been applied by this Court to the EDC:

> "'The general rule is well established that a corporation is charged with constructive knowledge, regardless of its actual knowledge, of all material facts of which its officer or agent receives notice or acquires knowledge while acting in the course of employment within the scope of his or her authority, even though the officer or agent does not in fact communicate the knowledge to the corporation . . . [T]his rule rests upon the presumption that the agent will communicate to the corporation the facts learned by the agent, as it is the agent's duty to do it, and whether the agent performs such duty or not, the corporation is bound.'"

Rhode Island Economic Development Corp. v. State Comm'n for Human Rights, 2002 WL 1804070, June 27, 2002, Silverstein, J., at *7 (quoting United States v. Bank of New England, N.A., 821 F.2d 844 (1st Cir.). Thus, the general rule is that the knowledge of corporate officers and agents is knowledge of the corporation itself.

While the general rule is of the utmost importance, equally as important are its limits. The Restatement of Agency actually begins its statement of the general rule by stating, "For purposes of determining a principal's legal relations with a third party . . . ." Restatement (Third) of Agency § 5.03. The Restatement goes on to explain that "[n]otice is not imputed for purposes of determining rights and liabilities as between principal and agent." Id. cmt. b.

In re Distilled Spirits, 78 U.S. 356, 367 (1870).

[19] While the Court took an extra semantic step by referring to this situation as "actual knowledge" rather than "imputation," this Court will continue to refer to the concept as "imputation" to the corporation. Although the sentiment is the same, imputation remains the more prevalent phraseology to analyze the situation. See Fletcher, supra, §§ 786-89 (acknowledging that "in legal effect" knowledge of a proper corporate agent is knowledge of the corporation, but using imputation nomenclature).

Fletcher Cyclopedia of Corporations also adopts this limitation on imputation by qualifying the operation of the underlying presumption—that the agent communicates the relevant facts to the principal—to situations "[w]here others than the principal and agent are concerned . . . ." Fletcher, supra, § 790. In Cook, the Rhode Island Supreme Court recognized this principal when it stated that "in dealing with such officers, as with the corporation itself, third parties have a right to consider that what they know it knows." 65 A. at 655 (emphasis added).

b

The Adverse Interest Exception

The most recognized exception to imputation—and the only one that seems to carry a consistent name—is the adverse interest exception. The Restatement of Agency frames the exception as follows:

> "For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person. Nevertheless, notice is imputed (a) when necessary to protect the rights of a third party who dealt with the principal in good faith; or (b) when the principal has ratified or knowingly retained a benefit from the agent's action." Restatement (Third) of Agency § 5.04.

As the general rule is based upon the presumption that the agent performs his duty by communicating knowledge to the principal, no such presumption can arise when the agent is working in his own interest. Fletcher, supra, § 819. "To come within the adverse interest exception, the agent must have totally abandon[ed] the principal's interests and be acting entirely for the agent's own or another's purposes." Id. "The exception cannot be invoked merely because the agent has a conflict of interest or because the agent is not acting primarily for the principal." Id.

Cases stress the element that the agent be working for his own benefit. The Federal Circuit described New York's law on the adverse interest exception as applying "'when the agent has abandoned his or her principal's interests and is acting entirely for his or her own or another's purposes.'" Long Island Savings Bank, FSB v. U.S., 503 F.3d 1234, 1249 (Fed. Cir. 2007) (quoting Christopher S. v. Douglaston Club, 713 N.Y.S.2d 542, 275 A.D.2d 768 (N.Y. App. Div. 2000)). The First Circuit noted that the "'Adverse Interest' in the context of imputation means that the manager is motivated by a desire to serve himself or a third party, and not the company, the classic example being looting." Baena v. KPMG LLP, 453 F.3d 1, 8 (1st Cir. 2006).

c

Collusion Exception

Defendants are correct that no "collusion exception" exists as such. See, e.g., Hr'g Tr. 18:20-24, May 23, 2013. However, Fletcher Cyclopedia of Corporations has captured what this Court believes is an exception to imputation that emanates from various concepts in imputation doctrine and policy. In the subsection "Persons Entitled to Rely on Notice," Fletcher describes the rule as to a "Person in Collusion with Officer or Agent" as follows:

> "If a person colludes with an agent to cheat the principal, the principal is not responsible for the acts or knowledge of the agent. The rule charging the principal with what the agent knows is for the protection of innocent third parties, not those who use the agent to further their own frauds upon the principal. The rule imputing agents' knowledge to the principal is intended to protect those exercising good faith and not as a shield for unfair dealing."

Fletcher, supra, § 804. Thus, this rule integrates the concepts of collusion with an agent, the protection of third parties, good faith, and unfair dealing.

Additional authorities support the theory of denying imputation in the setting where an agent is involved in the mischief perpetrated against the principal. In Official Committee of

Unsecured Creditors of Allegheny Health Education and Research Foundation (AHERF) v. PriceWaterhouseCoopers, LLP, 989 A.2d 313, 333 (Pa. 2010), the Pennsylvania Supreme Court considered, on a certified question from the Third Circuit, whether knowledge of officers should be imputed in a case against an auditor. The court drew "sharp distinction between those who deal in good faith with the principal-corporation in material matters and those who do not." Id. at 335. The good faith actors include those with some degree of culpability, such as auditors accused of malpractice limited to negligence. Id. In this negligent auditor context, the court recognized that imputation would apply. Id. On the "issue of auditor collusion," however, the court took a "much different view" because "the ordinary rationale supporting imputation breaks down completely in scenarios involving secretive, collusive conduct between corporate agents and third parties." Id. at 336. In determining that imputation should not operate in that context, the court stated:

> "The underlying assumption that an agent will communicate all material information to his principal, does not logically pertain to instances in which there is collusion to withhold information from corporate governance.
>
> This confluence of agency-law principles demonstrates that, fundamentally, imputation is not justified in scenarios involving secretive, collusive activity on the part of an auditor to misstate (and/or sanction management's misstatement of) corporate financial information. In fact, as noted, both parties accept this general conclusion (in principle at least) by recognizing a 'collusion' exception to imputation."

Id. at 337 (citations omitted). A legal encyclopedia also notes that imputation "is not intended to serve as a shield for unfair dealing by the third person." 3 Am. Jur. Agency § 284. Furthermore, imputation is not appropriate "where third persons use the agent to further their own frauds upon the principal or where the third person did not intend or expect that the agent would communicate the facts or the truth to the principal, such as where the third person colludes with the agent in acting adversely to the principal." Id.

Although it appears in its discussion of the Adverse Interest Exception, the Restatement of Agency expresses similar sentiment toward the good or bad faith of the third party. Couched in terms of risk allocation, the Restatement provides:

> "It is helpful to view questions about imputation from the perspective of risk assumption, taking into account the posture of the third party whose legal relations with the principal are at issue. A principal assumes the risk that the agents it chooses to interact on its behalf with third parties will, when actual or apparent authority is present, bind the principal to the legal consequences of their actions. This is because the principal chooses its agents, has the right to control them, and determines how to characterize its agents' positions and indicia of authority in manifestations made to third parties. See § 1.03, which defines "manifestation." A principal's incentive systems and other practices may also have the effect of discouraging agents from reporting information that, after the fact, it would have been advantageous for the principal to have known.
>
> In contrast, when the third party whose legal relations with the principal are at issue has not dealt with the principal (either directly or through an agent) or has not dealt in good faith, the principal does not bear the risk that its agent may withhold relevant information to serve the agent's own purposes or those of another person. A principal should not be held to assume the risk that an agent may act wrongfully in dealing with a third party who colludes with the agent in action that is adverse to the principal. That is, the third party should not benefit from imputing the agent's knowledge to the principal when the third party itself acted wrongfully or otherwise in bad faith. The circumstances surrounding a transaction, including the magnitude of benefit it will confer on the agent who arranges it, may place a reasonable third party on notice that the agent will withhold material information from the principal."

Restatement (Third) of Agency § 5.04 cmt. b.

Although the Court has just discussed the legal nuances of this area of law, a rule that prevents bad faith colluders from benefitting from imputation is, frankly, common sense and good public policy. If a person engages in deceptive action with the agent of a corporation and thereby harms the principal corporation, why should that person be able to shield itself from liability? The victimized entity should be able to seek recovery against all who deceived it, not just its own rogue agent.

2

Application of Imputation Principles

a

Application of the General Rule and Third Party Limitation

i

Officers, Law Firms, and Financial Advisor

In this case, the EDC is the principal and its officers—Stokes, Saul, and Stolzman—are clearly its agents. Officers are agents of a corporation. As Executive Director, Stokes was an officer and agent of the EDC. Sec. 42-64-8(d) ("The chief executive officer of the corporation shall be executive director of the corporation . . . ."). As Deputy Director, Saul was an officer and agent of the EDC. See id. § 42-64-8(e) ("The board of directors shall appoint a secretary and such additional officers and staff members as they shall deem appropriate . . . ."). Finally, Stolzman is an officer and agent by virtue of his position as secretary. See id. In addition to their general duties as officers of the corporation, the Inducement Resolution passed by the EDC Board specifically granted authority to Stokes, Saul, and others in dealing with 38 Studios: "Each of the Chairman, Vice Chairman, Executive Director, any Deputy Director, Treasurer, and the Associate Director Financial Services of the EDC, acting singly, is authorized to take all actions which are necessary and proper, and sign any and all documents, required to affect the intent of this Resolution." (Inducement Resolution, June 14, 2010, at 4.) Thus, Stokes, Saul, and

Stolzman cannot rely on imputation because they were officers of the EDC. See Restatement (Third) of Agency § 5.03 cmt. b ("[I]mputation does not furnish a basis on which an agent may defend against a claim by the principal.").

Similarly, the lawyers and law firms—Stolzman,[20] Adler Pollock, Afonso, and Moses Afonso—also cannot rely on imputation because they were also agents. Lawyers are agents for their clients. See Restatement (Third) of The Law Governing Lawyers § 16A cmt. c. ("The lawyer's efforts in a representation must be for the benefit of the client."); Id. § 28A cmt. b. ("Under traditional agency principles, a lawyer's knowledge relating to the representation is attributed to the lawyer's client.") The Complaint alleges that Adler Pollock was general counsel to the EDC, with Stolzman having primary responsibility for EDC matters and that Moses Afonso was a law firm providing professional services to the EDC, with Afonso as the attorney assigned to the EDC. (Compl. ¶¶ 12-13.)

Finally, First Southwest served as financial advisor to the EDC. (Compl. ¶ 7.) Additionally, the EDC alleges that it placed "special trust and reliance" on First Southwest. Id. ¶ 79. Given this role, First Southwest was an agent of the EDC. See Restatement (Third) of Agency § 1.01. Thus, First Southwest cannot impute knowledge to the EDC.

First Southwest and other Defendants argue that there are a "litany of cases where courts have found that 'agents' can rely on imputation." (Defs.' Response to Pl.'s Sur-Reply Mem. 5.) The case that they rely most heavily upon is Baena v. KPMG LLP, 453 F.3d 1 (1st Cir. 2006). However, Baena—and the other corresponding cases—do not apply here. First, Baena was an in pari delicto case. Id. at 6. Although Baena recognizes that imputation questions "arise[]

[20] Although held to be an agent as Secretary of the EDC, Stolzman is also included here for completeness and in case there is a difference between legal work and his work as Secretary, particularly as it may relate to the respondeat superior liability of Adler Pollock.

naturally in applying the in pari delicto doctrine," the court applied the in pari delicto doctrine, not just imputation. Id. at 7. More to the point, the plaintiff in Baena did not make the argument that is asserted here. The plaintiff did not "argue that under traditional standards imputation in this case would be improper," but rather relied on two exceptions. Id. The EDC does make that argument (in addition to alternative arguments as to exceptions, which are discussed later). Thus, the Baena court did not directly analyze the status of the defendant in relation to the plaintiff in the imputation context. Finally, the defendant in Baena was hired to audit the plaintiff. The function of an auditor is much different than the functions of the defendants here. See id. at 3 n.2.

In a similar vein—indeed, the argument is supported exclusively by Baena—many of these Defendants attempt to narrowly encase the third party limitation to suits by principal companies against their officers. The Defendants contend that the EDC misreads comment (b) to Section 5.03 of the Restatement of Agency, arguing that it does not bar imputation of other agents' knowledge of facts to the principal. (Defs.' Response to Pl.'s Sur-Reply Mem. 4.) It is here that the Law Firms and the banks[21] throw their executive co-defendants under the bus: "For example, here, Stokes and Saul cannot defend this case based on the imputation of their knowledge to the EDC. But the knowledge of EDC's CEO and Deputy Director is imputed to EDC with respect to EDC's claims against the banks and the law firms." Id. (emphasis in original). In this argument, however, the Defendants ignore the fact that the allegations all relate to the same subject matter, and it is alleged that they acted as a group to advise and aid the EDC. Thus, the Defendants' roles were intertwined and not separate such that Stokes and Saul should

[21] The Defendants' Response to the Plaintiff's Sur-Reply argues that "the Law Firms and the Banks Can Rely on Imputation" without defining "the Banks." From the context, the Court assumes that "the Banks" refers to Wells Fargo, Barclays, and First Southwest. Regardless of whoever constitutes "the Banks," the Court's conclusion would be the same.

be treated differently than all of the other agents. This is different from Baena. Although the allegations in Baena included, and went beyond, negligence, "in effect charg[ing] that the accounting firms knowingly tolerated patently improper accounting practices by [the corporation] in order to retain a lucrative client for KPMG," our situation is yet another step beyond. Baena, 453 F.3d at 4. Baena did not include an allegation that the accounting firms worked with the corporation's management to accomplish a shared goal. Here, the Complaint details the interactions between the EDC's officers and the other Defendants, including, for example, joint presentations to the Board. The Defendants did not merely tolerate improper practice while performing a wholly independent function, but rather participated directly in the deal.

Therefore, Stokes, Saul, Stolzman, Adler Pollock, Afonso, Moses Afonso, and First Southwest cannot rely on imputation because they were agents of the EDC regarding the matter which the EDC is bringing an action against them.

ii

Wells Fargo and Barclays

Wells Fargo and Barclays acted as placement agents in the 38 Studios deal. While "agent" appears in its title, that term is not necessarily dispositive as the scope of the agency may be limited.

Under the BPA, Wells Fargo agreed "to use its best efforts to privately place, on behalf of the Issuer and the Company," all of the Bonds. (BPA, at 1.) However, the allegations as to Wells Fargo's knowledge and responsibility go well beyond that. While the Court considers the BPA on this Motion to Dismiss given its centrality to the Complaint, that consideration does not permit the Court to eschew the related allegations contained in the Complaint. The Complaint alleges that Wells Fargo's role as a placement agent "involved putting together the factual disclosure of the risks of the transaction in an offering document such as a private placement memorandum, and selling the Bonds on behalf and for the account of the EDC." (Compl. ¶ 77.) Indeed, Wells Fargo allegedly solicited that role. Id. Moreover, "counsel for Wells Fargo had circulated an initial draft of that private placement memorandum (the 'Bond PPM'), even prior to the EDC Board's adoption of the Authorizing Resolution." Id. ¶ 114. Furthermore, Wells Fargo held additional knowledge from its earlier preparation of the Equity PPM. See Compl. ¶¶ 45, 116. Most poignantly, however, the Complaint alleges the following regarding Wells Fargo's role in relation to the EDC:

> "Plaintiff's trust and confidence in and reliance on Defendant Wells Fargo was greater than is typical for the relationship between an issuer and placement agent, since typically the issuer of a privately (or publically) placed bond or other security intends to use the capital in the issuer's own enterprise and, therefore, the issuer is uniquely familiar with the activity to be financed by the bonds or other security offering and the source of repayment thereof and does not depend upon the placement agent for information concerning that activity, including the viability of that activity and of the issuer's enterprise in general. In this case, however, the Bonds were conduit bonds, in that although Plaintiff was the issuer of the Bonds, the financing was for 38 Studios and the likelihood of the bondholders being paid by the EDC depended on 38 Studios' business plans and projections, not on Plaintiff's plans or projections."

(Compl. ¶ 77.) Although the BPA contains warranties regarding the Bond PPM, those warranties do not relieve Wells Fargo of its agent status for imputation purposes. The EDC's warranties in the BPA relate to the Bond PPM, which Wells Fargo prepared on behalf of the EDC. Id. ¶¶ 114-15. The EDC alleges that the Bond PPM failed to disclose that the net proceeds would not be sufficient for 38 Studios to relocate to Rhode Island and complete Copernicus. Id. ¶ 118. Had that disclosure been made, the EDC alleges that "it would come to the attention of the EDC Board even prior to the Closings, and that such disclosure would likely be fatal to the entire transaction." Id. ¶ 120. Wells Fargo and others "withheld the information." Id. Finally, both the BPA and the Bond PPM are signed on behalf of the EDC by Stokes, who is a co-defendant and a participant in the larger scheme. Thus, Wells Fargo cannot hide behind the BPA's warranties, which were allegedly deficient because Wells Fargo and others withheld information.

Therefore, Wells Fargo's role as placement agent, combined with the totality of the allegations about its prior knowledge and other actions taken on behalf of the EDC, most notably the preparation of the Bond PPM, mean that Wells Fargo was an agent of the EDC such that it cannot rely on the imputation of the knowledge that it had to defeat the claims against it.

Much of the argument on Barclays' place in this case centered around whether Wells Fargo's knowledge can be imputed to Barclays. This stems primarily from paragraph 115 of the Complaint, which states:

> "Defendant Wells Fargo accepted this agency responsibility, including, inter alia, the responsibility to prepare the Bond PPM and assist the EDC to sell the Bonds, on its own behalf and on behalf of Defendant Barclays, with Barclays' knowledge and agreement. Defendant Wells Fargo's knowledge, actions, and duties are imputed to Barclays, and Barclays is also a fiduciary and owed fiduciary duties to the EDC and the EDC Board."

The allegation that Wells Fargo's knowledge, actions, and duties are imputed to Barclays is a legal conclusion that this Court need not accept as true. See Doe ex rel. His Parents and Natural Guardians v. East Greenwich School Dept., 899 A.2d 1258, 1262, n.2 (R.I. 2006) ("Allegations that are more in the nature of legal conclusions rather than factual assertions are not necessarily assumed to be true.") (emphasis in original). Moreover, the EDC's strained joint venture theory is not supported by the Complaint.

> "Generally, in order for a joint venture to exist, the parties must be bound by express or implied contract providing for: (1) a community of interests, and (2) joint or mutual control, that is, an

> equal right to direct and govern the undertaking. In addition, the joint venture agreement must provide for a sharing of losses as well as profits."

McAleer v. Smith, 860 F. Supp. 924, 943 (D.R.I. 1994). The Complaint does not speak to the relative control between Wells Fargo and Barclays nor their sharing of profits or losses. The Court cannot accept the EDC's conclusory description of the contents of the Complaint in its memorandum, which makes no reference to which of the 301 paragraphs of the Complaint that purportedly contain such information. See Pl.'s Mem. in Opp'n 155.

Nevertheless, the Court must consider the relationship that is really at issue here: the relationship between the EDC and Barclays. The allegation that Wells Fargo bound Barclays to assist the EDC to sell the Bonds, i.e., be a placement agent, is supported by the BPA, where Wells signed on behalf of Barclays. The agreement to place the Bonds, however, does not necessarily carry with it a duty to verify the accuracy of certain information, particularly given that in the BPA, the EDC (as issuer) warranted that the Bond PPM was "true and correct in all material respects . . . ." (BPA § 4h.) But Paragraph 115 also states that "Wells Fargo accepted . . . the responsibility to prepare the Bond PPM and assist the EDC to sell the Bonds, on its own behalf and on behalf of Defendant Barclays, with Barclays' knowledge and agreement." (Compl. ¶ 115 (emphasis added)). Thus, reading the Complaint in the light most favorable to the EDC, the EDC has pled that Wells Fargo bound Barclays, with Barclays' knowledge and agreement, to participate in the preparation of the Bond PPM. Accordingly, Barclays would have a duty to the EDC to ensure the accuracy of the Bond PPM; as alleged, Barclays and other Defendants "knew or should have known that the Bond PPM omitted to state [sic] that 38 Studios would run out of cash in 2012 according to its own projections." (Compl. ¶ 138.) Accordingly, because it is alleged that Barclays undertook to prepare the Bond PPM on behalf of the EDC, Barclays cannot be considered a third party and cannot rely on imputation here.

iii

The 38 Studios Defendants and Starr Indemnity

The EDC admits that the 38 Studios Defendants and Starr Indemnity are third parties. (Pl.'s Sur-Reply Mem. 9.) While the Third Party Limitation does not bar the imputation of knowledge to the EDC as to 38 Studios, the Court must continue the analysis to consider whether another exception will prevent imputation.

b

Application of the Adverse Interest Exception

The Adverse Interest Exception does not apply to the 38 Studios Defendants. Although the EDC makes an implicit reference to this exception, it did not actually make an argument applied to the facts. See Pl.'s Sur-Reply Mem. 4.

c

Application of the Collusion Exception

Up to this point, the 38 Studios Defendants are the only Defendants that may still rely on imputation. Thus, the Court will consider whether the facts alleged in the Complaint permit an inference that the 38 Studios Defendants acted in the bad faith, collusive manner to fit within the Collusion Exception expressed above.

As discussed above, there is a "sharp distinction between those who deal in good faith with the principal-corporation in material matters and those who do not." AHERF, 989 A.2d at 335. The 38 Studios Defendants contend that the Complaint shows that they acted in good faith. Indeed, they are right to point to paragraphs in the Complaint that suggest that they provided much information to the EDC. Even at oral argument, the EDC acknowledged that the 38 Studios Defendants had been an open book up to a point. However, according to the Complaint, the 38 Studios Defendants intentionally defrauded the EDC. (Compl. Count III.) Additionally, MacLean allegedly committed larceny, with Schilling, Wester, and Zaccagnino, aiding and abetting that larceny. (Compl. Count XII.) These allegations are clearly not consistent with good faith. Furthermore, the allegations expressed below regarding concerted action with other Defendants are not consistent with fair dealing. Thus, the Complaint alleges that the 38 Studios Defendants did not act in good faith with the EDC.

The Complaint alleges that "the Advisors as well as Defendants Schilling, Zaccagnino, Wester, and MacLean knowingly and intentionally participated in the following acts and practices":

> a. "allowing Defendant MacLean and 38 Studios to commit larceny, as set forth in paragraphs 274 & 275-278, <u>infra</u>;
>
> b. causing the EDC Board to unwittingly violate R.I. Gen. Laws § 42-64-10 by adopting a false finding that adequate provision has been made or will be made for completion of the project;
>
> c. arrogating to themselves the decision-making process concerning the terms under which the EDC would make the loan and issue the Bonds and treating the EDC Board as an obstacle to be overcome and manipulated, in violation of state law that the powers of the EDC are vested in the EDC Board;
>
> d. permitting 38 Studios to utilize financial projections that were based on known false assumptions and failed to include known expenses;
>
> e. suppression of the EDC's usual and customary method of evaluating potential loans through preparation of thorough internal credit memoranda;
>
> f. structuring presentations to the EDC Board that failed to address the core merits of the 38 Studios' transaction and contained material misrepresentations and omissions;
>
> g. keeping the EDC Board from hearing the contrary opinions of Raimondo, Chafee, or Caprio;

h. falsifying the Authorizing Resolution and the Term Sheet to conceal the shortfall;

i. manipulating the agenda for EDC Board meetings to keep the EDC Board from exercising their right to reconsider their approval before the Closings on November 2, 2010;

j. falsely stating to the EDC Board that the EDC by August 2010 was legally required to complete the transactions;

k. having the EDC issue press releases which falsely stated that the EDC had performed exhaustive due diligence in connection with the transactions;

l. depriving the EDC of independent third party assessment of the transaction prior to the Closings or ever; and

m. securing adoption of the Authorizing Resolution by mollifying the EDC Board with assurances regarding third party monitoring and then not reporting to and concealing from the EDC Board the absence of meaningful third party monitoring."

(Compl. ¶ 32.)

These types of actions lend themselves to an inference of concerted action among the parties. Collectively, these actions are tied together when the Defendants act together. Most poignantly, the Complaint alleges that the 38 Studios Defendants "combined and conspired" to violate statutes with Stolzman, Adler Pollock, Moses Afonso, Afonso, First Southwest, Wells Fargo, and Barclays. Id. ¶¶ 255, 267, 278. The Complaint contains other allegations of allegedly deceptive actions undertaken together. For example, Afonso provided details to the EDC Board regarding the Authorizing Resolution at an EDC Board meeting, with Schilling in attendance, but omitted the projected shortfall. Id. ¶¶ 107-08.

Further, the individual "acts and practices" permit inferences of concerted action. For example, the Complaint alleges that the Defendants participated in "permitting 38 Studios to utilize financial projections that were based on known false assumptions and failed to include known expenses." Id. ¶ 32d. Thus, 38 Studios used the incorrect financial projections, with the knowledge of the other parties, and the other parties abdicated their gatekeeper role of scrutinizing the accuracy of such financial projections for the EDC. On third party monitoring issues, the Defendants "depriv[ed] the EDC of independent third party assessment" and "secur[ed] adoption of the Authorizing Resolution by mollifying the EDC Board with assurances regarding third party monitoring and then not reporting to and concealing from the EDC Board the absence of meaningful third party monitoring." Id. ¶ 32l-m. "Defendants Stolzman, Adler Pollock, Moses Afonso, Afonso, Stokes, Saul, and First Southwest allowed 38 Studios to reject [International Film Guarantors, LLC] and instead select International Business Machines ('IBM') as the third-party monitor." Id. ¶ 189. Thus, the resolution to the third party monitoring issue required 38 Studios to work with the other Defendants. Indeed, it seems that 38 Studios was the impetus behind the allegedly deceptive resolution to the third party monitoring issue. See id. (alleging that 38 Studios rejected International Film Guarantors, LLC in favor of IBM). Furthermore, the EDC entered into a Project Monitoring Agreement with 38 Studios that purported to assign to the EDC all of 38 Studios' rights against IBM. Id. ¶ 193. But both the 38 Studios Defendants and "Defendants Stolzman, Afonso, Saul, and Stokes knew or should have known that the purported assignment was void, and that such an arrangement was totally ineffectual and would not and could not conform to the authority that Stokes and Stolzman had received from the EDC Board."[22] Id.

The 38 Studios Defendants point to the fact that Stokes and Saul are not included in the civil conspiracy count. See Compl. Count XIV. Drawing a negative inference from the fact that Stokes and Saul are not included in the civil conspiracy count would not be consistent with

[22] It can be inferred that the 38 Studios Defendants knew that the assignment would be ineffective because they were party to the agreement with IBM that expressly prohibited either party from assigning its rights to a third party. See id. ¶ 191.

reading the Complaint in the light most favorable to the Plaintiff. See A.F. Lusi Constr., Inc., 934 A.2d at 795. Further, the Court must view the Complaint as a whole. See Patriarca v. F.B.I., 639 F. Supp. 1193, 1198 (D.R.I. 1986) ("For purposes of a motion to dismiss the amended complaint will be considered as a whole and each count will not be considered seriatim.")

Thus, the Complaint alleges that the 38 Studios Defendants, along with the other Defendants, knowingly and intentionally participated in actions that can only be accomplished with multiple people or entities working together. The Court also observes that this is based on a reading of the Complaint in the light most favorable to the EDC, as required on a Motion to Dismiss. See A.F. Lusi Constr., Inc., 934 A.2d at 795. This does not mean that the EDC has proved or even can prove this concerted action; it only means that the Complaint permits the inference.

Therefore, the Court concludes that the 38 Studios Defendants fall within the Collusion Exception and therefore may not impute the EDC's officers' and agents' knowledge to the EDC.[23]

3

Summary of Court's Conclusions on Imputation

No Defendant can rely on the imputation doctrine for the reasons stated above. No additional counts are dismissed on this basis.[24]

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[23] Although the Court found supra that the other Defendants were not third parties and thus could not rely on imputation on that ground, this exception could also apply to the other Defendants. Discussion of the collusion among other Defendants occurs below, as needed.

[24] Because the Court finds in favor of the EDC on the imputation issue, it does not discuss the viability of the EDC's argument that imputation is precluded because the EDC is a public agency.

C

In Pari Delicto

Some Defendants[25] also argue that the doctrine of in pari delicto bars recovery by the EDC. In pari delicto literally means "in equal fault." Baena, 453 F.3d at 6. It "is a doctrine commonly applied in tort cases to prevent a deliberate wrongdoer from recovering from a co-conspirator or accomplice." Id.

A corporation can only know what its officers, agents, and employees know. See Cook, 65 A. 655; see also Prime Eagle Group Ltd. v. Steel Dynamics, Inc., 614 F.3d 375, 378 (7th Cir. 2010) ("Corporations do not have brains, but they do have employees. One fundamental rule of agency law is that corporations 'know' what their employees know—at least, what employees know about subjects that are within the scope of their duties."). Here, the claims center around fraud, misrepresentation, and nondisclosure. For the EDC to be in equal fault with the Defendants, the EDC must have the knowledge that would cause them to have fault. Thus, an in pari delicto argument in the first instance is dependent on the imputation of knowledge from the officers and agents to the corporation. This is acknowledged by at least Adler Pollock. (Adler Pollock Reply Mem. 27-28 ("Because its directors' knowledge is imputed to the EDC . . . the EDC is at least equally responsible for any harm that resulted from the 38 Studios deal and is precluded from bringing these claims.")) In AHERF, the court framed the initial question as "whether such knowledge of the alleged fraud and complicity as was held by AHERF officers

[25] First Southwest explicitly disclaimed an in pari delicto doctrine argument. (First Southwest Reply Mem. 22.) However, Adler Pollock argues both pure imputation and in pari delicto separately. (Adler Pollock Mem. in Supp. 17-22). Saul incorporated Adler Pollock's in pari delicto argument into its memorandum. (Saul Mem. in Supp. 8-9.) Stokes joined the Adler Pollock argument and also made his own argument. (Stokes Mem. in Supp. 6-8). Moses Afonso makes an in pari delicto argument in a footnote while addressing the adverse interest exception to imputation. (Moses Afonso Mem. in Supp. 39 n.18.)

should be imputed to the corporation, thereby exposing it to an application of the in pari delicto doctrine and/or other defenses which might arise, in the first instance, against an active wrongdoer proceeding volitionally." See AHERF, 989 A.2d at 333. Because it found that imputation was not available to the defendant auditor, the in pari delicto defense was "effectively foreclose[d]." Id. at 312. Therefore, because the Court concluded that imputation was not available to any defendant, an in pari delicto defense is also not available to defeat the claims on a Motion to Dismiss.

D

Individual Arguments Applying to All or Most Counts

1

Saul and Stokes Public Duty Doctrine

Saul and Stokes request that the Court dismiss the claims against them because they "should be immune from civil liability pursuant to the 'Public Duty Doctrine.'" (Saul Mem. in Supp. 14.)[26] Essentially, the argument is that the EDC serves a public purpose; the public duty doctrine protects the government's ability to perform its function without the threat of litigation, particularly in matters of governmental planning or political decision-making; and that the alleged actions or omissions of Saul relate to actions taken to relocate 38 Studios to Rhode Island, as directed by the Governor and enabled by the Legislature. In sum, Saul argues that "[i]t is appropriate for this Honorable Court to rule that the public duty doctrine extends to shelter governmental employees from actions brought by the governmental entities that they serve, in

[26] Stokes incorporated Saul's argument on the Public Duty Doctrine. (Stokes Mem. in Supp. 8.)

circumstances where their conduct would otherwise be protected against third parties."[27] Id. at 19.

The shelter of the public duty doctrine, however, does not apply to this situation where the employer is suing the employee. Under the pubic duty doctrine, "immunity provided to state and municipal authorities . . . 'shields the state and its political subdivisions from tort liability arising out of discretionary governmental actions that by their nature are not ordinarily performed by private persons.'" Torres v. Damicis, 853 A.2d 1233, 1239 (R.I. 2004) (quoting Haley v. Town of Lincoln, 611 A.2d 845, 848, 849 (R.I. 1992)). Thus, the public duty doctrine only applies to suits brought by members of the public against state and municipal authorities. See id. The EDC is not suing Saul for a breach of his general duty to the public, i.e., the Complaint does not allege that Saul failed to "promote and encourage the preservation, expansion, and sound development of new and existing industry, business, commerce, agriculture, tourism, and recreational facilities in the state, [thereby] promot[ing] the economic development of the state and the general welfare of its citizens." Sec. 42-64-5(1). Nor is the EDC suing Saul for a policy choice. The EDC is suing Saul for breach of fiduciary duties owed directly to the EDC, along with other breaches of trust. No member of the general public is a party to this suit. Furthermore, the doctrine would not apply to the type of claims set forth here. The Complaint alleges that actions or omissions by Saul resulted in a violation of state law; thus, it is hard to see how they could be considered discretionary governmental actions. See, e.g., Compl. ¶ 103.

[27] The Court need not decide whether the conduct alleged "would otherwise be protected against third parties"; however, given the nature of the allegations, such an application should not be taken for granted.

Attempting to apply the public duty doctrine to this situation would be like attempting to fit a square peg into a round hole. Although the purposes of the public duty doctrine could conceivably be served by barring suit by the general public against the EDC's officers, a suit by the employer (EDC) against its employees (Stokes and Saul) for fraud and other breaches of trust does not fall within the ambit of the public duty doctrine. Therefore, the public duty doctrine does not provide immunity to Stokes and Saul.

2

Starr Indemnity Policy Exclusion

Starr Indemnity is named as a defendant in this action pursuant to G.L. 1956 § 27-7-2.4, which provides:

> "Any person, having a claim because of damages of any kind caused by the tort of any other person, may file a complaint directly against the liability insurer of the alleged tortfeasor seeking compensation by way of a judgment for money damages whenever the alleged tortfeasor files for bankruptcy, involving a chapter 7 liquidation, a chapter 11 reorganization for the benefit of creditors or a chapter 13 wage earner plan, provided that the complaining party shall not recover an amount in excess of the insurance coverage available for the tort complained of."

Starr is a defendant only as to four counts: Counts V, VII, X, and XVI.[28] To assert a cause of action against Starr, the EDC must allege (1) a tort claim against 38 Studios, and (2) that Starr is a liability insurer of 38 Studios. Starr's arguments against the individual substantive counts are addressed below in Section III.E. Here, the Court considers Starr's broader argument for dismissal: under the insurance policy, "potential coverage for 38 Studios' alleged tort liability to the EDC is precluded by the exclusions for Claims arising out of any unlawful profit or

[28] As noted above, the EDC and Starr stipulated to the dismissal without prejudice of Count VIII as to Starr.

advantage gained by an Insured or Claims arising from or in consequence of actual or alleged contractual liability of an Insured." (Starr Indemnity Mem. in Supp. 14.)

The insurance policy, however, is not properly before the Court at this stage. The cases cited by Starr support the consideration of an insurance policy in cases directly between the insurer and the insured. For example, in Golchin v. Liberty Mut. Ins. Co., 950 N.E.2d 853, 856 (Mass. 2011), the Massachusetts Supreme Judicial Court considered a standard auto policy attached to a motion to dismiss but not the complaint, in a suit by an insured woman in a car accident against her insurer. The Court decided that a Motion to Dismiss need not be converted to a Motion for Summary Judgment to consider documents outside the complaint "'[w]here . . . the plaintiff had notice of [the extrinsic] documents and relied on them in framing the complaint . . . . '" Id. at 856-57 (quoting Marram v. Kobrick Offshore Fund, Ltd., 809 N.E.2d 1017, 1021 n.4 (Mass. 2004)). The insurance policy here is between 38 Studios and Starr, and 38 Studios (the company) is not a party to this litigation. While the EDC obviously had notice of the existence of 38 Studios' insurance policy, the Complaint does not suggest that the EDC had the complete contents of the policy. The policy is only mentioned in one sentence in the Complaint: "Starr issued a policy of insurance under which 38 Studios LLC (and its subsidiaries) are named insureds." (Compl. ¶ 7.) Indeed, in their opposition memorandum and at oral argument, the EDC questioned the authenticity and completeness of the purported insurance policy document submitted by Starr. See Pl.'s Mem. in Opp'n 229-230; Hr'g Tr. 172:20-173:6; 177:22-24, June 4, 2013. "[A] court may consider [an external document] in determining whether to dismiss the complaint if it was integral to and explicitly relied on in the complaint and if the plaintiffs do not challenge its authenticity." American Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212, 234 (4th Cir. 2004) (citations and alterations omitted, emphasis added); see also Rhode

Island Resource Recovery Corporation v. Van Liew Trust Company et al., No. PC-10-4503, May 13, 2011, Silverstein, J., at 9. While Starr's counsel questioned the good faith of the EDC's counsel questioning the policy's authenticity, and in turn the EDC's counsel questioned Starr's questioning of the EDC's good faith, the Court will not address such a quibble over this issue on this Motion. It is sufficient here that the EDC has alleged the underlying claims against the 38 Studios Defendants (pending further analysis below) and that Starr issued an insurance policy to 38 Studios. (Compl. ¶ 7.)

Even if the Court considered the insurance policy, issues of fact persist, preventing the grant of a Motion to Dismiss. Starr argues that two exclusions require dismissal: (1) the Unlawful Profit or Advantage Exclusion and (2) the Contractual Liability Exclusion. The Unlawful Profit or Advantage Exclusion excludes claims "arising out of, based upon or attributable to the gaining of any profit or advantage or improper or illegal remuneration if a final judgment or adjudication establishes that such an Insured was not legally entitled to such profit or advantage or that such remuneration was improper or illegal[.]" (Starr Ex. A, Directors and Officers Liability Coverage Section, § 3(a), at 5.) The EDC admits that if it proves fraud against the 38 Studios Defendants, they would not be entitled to recovery from Starr. (Hr'g Tr. 167:0-11.) However, the EDC contends that the outcome would be different if it lost on a fraud theory but won on a negligence theory. A finding of liability for negligence may be insufficient to establish that 38 Studios was not legally entitled to the profit or advantage. Thus, the facts developed by the evidence clearly will have an effect on the outcome. The EDC is permitted to plead in the alternative. See Super. R. Civ. P. 8(d)(2). Thus, the Unlawful Profit or Advantage Exclusion does not bar a claim for relief at this Motion to Dismiss stage. See McKenna, 874

A.2d at 225 (function of the court is to determine whether "plaintiffs are entitled to relief under any conceivable set of facts").

The Contractual Liability Exclusion excludes claims "based upon, arising from, or in consequence of any actual or alleged liability of any Insured under any express contract or agreement, except to the extent that such Insured would have been liable in the absence of such contract or agreement . . . ." (Starr Ex. A, Directors and Officers Liability Coverage Section, § 3(e), at 5). Thus, the liability must arise from the terms of the express contract. See id. Here, the EDC has sued 38 Studios in tort. Although the EDC's claim rests in part upon the 38 Studios Defendants' failure to procure proper third party monitoring in its contract with IBM, the EDC's claim does not arise out of a liability of 38 Studios to IBM. Therefore, the Contractual Liability Exclusion does not bar a claim for relief at this stage.

The policy exclusions may provide a favorable result to Starr Indemnity on a Motion for Summary Judgment or at trial, but here, where the Court's sole function is to test the sufficiency of the Complaint, the Court cannot dismiss the claims against Starr on this basis. Narragansett Elec. Co., 21 A.3d at 277.

3

Arguments on Duplicative Nature of Claims

a

What is the Proper Rule?

The Plaintiffs argue that the Defendants' arguments on the duplicative nature of certain claims—arguments that certain claims should be dismissed because they are duplicative with other claims—should have been brought as a Rule 12(f) Motion to Strike rather than a Rule 12(b)(6) Motion to Dismiss for Failure to state a claim upon which relief can be granted. The

Court reiterates that a Motion to Dismiss tests the sufficiency of the Complaint, whereas an argument that a claim is duplicative is essentially an argument that the Complaint contains too much. Such an argument seems to better fit under the language of Rule 12(f): "the court may order stricken from any pleading . . . any redundant . . . matter." However, the Court notes that Rule 12(f) is not the only place that courts rule on such arguments, as cases have granted summary judgment for that reason. See, e.g., Broadway Inv. Trust, UDT 8/22/05 ex rel. Blechman v. Rapoza, 816 F. Supp. 2d 128, 140 (D.R.I. 2011). Furthermore, the Defendants' motions have been brought pursuant to Rule 12(b)(6); thus, the Court will consider them in that context.

b

The Law Firms' Argument of Claims Duplicative with Legal Malpractice

The Law Firms argue that Counts I, III, IV, V, VII, and VIII should be dismissed against them because they are duplicative with the claim for Legal Malpractice in Count VI. Both initial memoranda contain two identical sentences and string citations to support legal argument. Compare Moses Afonso Mem. in Supp. 26-27 with Adler Pollock Mem. in Supp. 23.

The Law Firms argue that "[c]ounts within a complaint may be dismissed if they are legally and factually 'indistinguishable from [a] previously pled . . . claim' and therefore 'unnecessarily duplicative' of other causes of action asserted therein." Adler Pollock Mem. in Supp. 23 (quoting 514 Broadway Inv. Trust, UDT 8/22/05 ex rel. Blechman v. Rapoza, 816 F. Supp. 2d 128, 140 (D.R.I. 2011)). The full quote from Broadway Inv. Trust is the following: "In these circumstances, [the tort of deceit] is indistinguishable from the previously-pled fraud claim, as are the allegations forming the basis of the claim. Consequently, because it is unnecessarily duplicative, D'Amico's motion for summary judgment on this count is granted, pursuant to Fed. R. Civ. P. 56(f)(2)." Broadway Inv. Trust, 816 F. Supp. 2d at 140. Thus, Broadway Inv. Trust does not apply here as it was decided under specific circumstances and on summary judgment. See id.

More specifically, the Law Firms contend that "alleged claims arising out of the attorney-client relationship are frequently dismissed as duplicative of legal malpractice claims when based on the same facts and alleged damages." (Adler Pollock Mem. in Supp. 23.) The Law Firms cite to a slew of cases purportedly "dismissing" claims in like circumstances. The first case, and the Rhode Island case, is Cronan v. Iwon, 972 A.2d 172 (R.I. 2009) (mem.). Cronan did not dismiss a claim as duplicative of legal malpractice. Indeed, it does not use any variation of the words "duplicative" or "redundant." The Court affirmed summary judgment on the basis that the plaintiff did not put forth expert evidence on either claim. See id. at 175. Although the Court used broad language that "[a] claim by a client against an attorney for breach of fiduciary duties is a claim for legal malpractice," it then analyzed the breach of fiduciary duty claim separately from the previously analyzed legal malpractice claim by stating that "expert evidence is required to establish the appropriate fiduciary duties owed by the attorneys unless such duties are a matter of common knowledge." Id. Thus, Cronan actually suggests that one can recover for both legal malpractice and breach of fiduciary duty. See id. To the extent that the cited cases from foreign jurisdictions say the opposite, then Rhode Island law prevails.

The Law Firms may be able to show that the claims will be duplicative after more evidence comes to light, and the EDC certainly cannot get double recovery. But this is a Motion to Dismiss, and this Court is merely testing the sufficiency of the Complaint. The Court will analyze the sufficiency of the individual counts below; however, it would be premature at this time to consider one count's effect on another given that the EDC is permitted to plead in the alternative. <u>See</u> Super. R. Civ. P. 8(d)(2). Therefore, the Court will not dismiss the other counts against the Law Firms as duplicative with Legal Malpractice.

c

Stokes' Duplicative Claims Argument

Stokes argues that Counts III, IV, V, VII, and VIII should be dismissed as duplicative with Count I (Breach of Fiduciary Duty). Stokes supports this two-paragraph argument with one case: <u>Broadway Inv. Trust</u>. As noted above, that case was decided on summary judgment, not on a Motion to Dismiss. For the same reasons as the rejection of the Law Firms' argument above, the Court will not dismiss the claims against Stokes.

E

Remaining Arguments: Count-by-Count

1

Count I: Breach of Fiduciary Duty

Wells Fargo and Barclays argue that Count I should be dismissed because they did not owe a fiduciary duty to the EDC. The other Defendants to this Count either do not challenge it, or their arguments have already been addressed above.

a

Fiduciary Duty Principles

"To prevail on a claim for breach of fiduciary duty, a party must establish (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach." <u>Rhode Island Resource Recovery Corporation v. Van Liew Trust Company et al.</u>, No. PC-10-4503, May 13, 2011, Silverstein, J., at 14 (citations omitted). "[T]he term 'fiduciary' is a broad concept that might correctly be described as 'anyone in whom another rightfully reposes trust and confidence.'" A. Teixeira & Co., Inc. v. Texeira, 699 A.2d 1383, 1387 (R.I. 1997) (quoting Francis X. Conway, The New York Fiduciary Concept in Incorporated Partnerships and Joint Ventures, 30 Fordham L. Rev. 297, 312 (1961)). "[A] fiduciary relationship 'arises whenever confidence is reposed on one side, and domination and influence result on the other' or 'when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other.'" Rhode Island Resource Recovery Corporation, No. PC-10-4503, May 13, 2011, at 15 (quoting Lyons v. Midwest Glazing, 265 F. Supp. 2d 1061, 1076 (N.D. Iowa 2003)). "Divining the existence of a fiduciary duty is a fact-intensive enterprise." Café La France, Inc. v. Schneider Securities, Inc., 281 F. Supp. 2d 361 (D.R.I 2003) (citing A. Teixeira & Co., Inc., 699 A.2d at 1387. "Among the relevant factors are the degree to which one party relies upon the other, the history of the parties' relationship preceding the incident spawning the alleged breach, the parties' relative levels of business sophistication, and the willingness of one party to accept guidance from the other." Id. (citing Simpson v. Dailey, 496 A.2d 126, 129 (R.I. 1985)).

b

Did Wells Fargo and Barclays Owe Fiduciary Duties to the EDC?

Wells Fargo focuses its argument on its position as a placement agent. To support the argument that placement agents do not ordinarily owe fiduciary duties to issuers, it cites primarily to cases concluding that an underwriter did not owe a fiduciary duty to an issuer. Although they serve somewhat similar functions, the role of a placement agent is not identical to that of an underwriter.[29] Given the copious factual allegations in the Complaint and the fact-

[29] "Placement" is "[t]he act of selling a new issue of securities or arranging a loan or mortgage." Black's Law Dictionary 1266 (9th Ed. 2009) (emphasis added). "Underwriting" is "[t]he act of

intensive inquiry, however, the Court need not decide whether placement agents, as a categorical matter, owe fiduciary duties to an issuer.

Building off its theory that underwriters do not owe fiduciary duties to their client issuer, Wells Fargo devotes an entire section to "The Leading Case in Rhode Island": Café La France, Inc. v. Schneider Securities, Inc., 281 F. Supp. 2d 361 (D.R.I 2003). Wells Fargo argues that Café La France holds that "an underwriter does not owe a fiduciary duty to an issuer in a normal arms-length transaction." (Wells Fargo Mem. in Supp. 8.) Café La France does not so broadly hold. In fact, after noting that the Rhode Island Supreme Court has not addressed the duties owed by an underwriter, the United States District Court recognized that other states "have acknowledged that such [an underwriter-issuer] relationship may give rise to fiduciary responsibilities." Id. at 372. Having noted at the outset that this analysis is fact-intensive, the United States District Court decided (in a bench trial decision) that the contents of the underwriter's sales pitch were not sufficient to create a fiduciary relationship. Id. at 373. "In short, Café simply has not demonstrated that the trust and confidence that it reposed in [the underwriter] was sufficient under the circumstances to create a fiduciary relationship." Id. (emphasis added). Even Wells Fargo's most applicable case, specifically on placement agents, acknowledges that the inquiry is factual: "The relationship created by a placement agreement, however, does not automatically give rise to a fiduciary duty. Whether a relationship is fiduciary in nature must be determined on the basis of the services agreed to by the parties." Robin Bay Associates, LLC v. Merrill Lynch & Co., No. 07 Civ. 376-JMB, 2008 WL 2275902, *3 (S.D.N.Y. June, 3, 2008) (citations omitted).

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agreeing to buy all or part of a new issue of securities to be offered for public sale." Id. at 1665 (emphasis added).

Once again, the Court reminds the parties that the facts for this analysis are the facts alleged in the Complaint, which are accepted as true and viewed in the light most favorable to the EDC. The facts alleged in the Complaint in this case go far beyond a mere sales pitch. As a starting point, this Court has already concluded that Wells Fargo was an agent of the EDC. See supra Sec. III.B.2.b.ii. "The existence of an agency supports the finding that a confidential relationship was established between brother and sister, as an agent always stands in the position of a fiduciary to his principal." See Cahill v. Antonelli, 120 R.I. 879, 883, 390 A.2d 936, 939 (1978) (using "confidential" and "fiduciary" interchangeably). Even if the above-discussed agency is not dispositive, it is at least a factor supporting a fiduciary duty.

Regarding the degree to which the EDC relied upon Wells Fargo, the Complaint alleges that:

> "Plaintiff's trust and confidence in and reliance on Defendant Wells Fargo was greater than is typical for the relationship between an issuer and placement agent, since typically the issuer of a privately (or publically) placed bond or other security intends to use the capital in the issuer's own enterprise and, therefore, the issuer is uniquely familiar with the activity to be financed by the bonds or other security offering and the source of repayment thereof and does not depend upon the placement agent for information concerning that activity, including the viability of that activity and of the issuer's enterprise in general. In this case, however, the Bonds were conduit bonds, in that although Plaintiff was the issuer of the Bonds, the financing was for 38 Studios and the likelihood of the bondholders being paid by the EDC depended on 38 Studios' business plans and projections, not on Plaintiff's plans or projections."

(Compl. ¶ 77.) Regarding the parties' relative levels of business sophistication, the Complaint alleges that "Wells Fargo had superior knowledge and experience concerning the video game industry in general, and of 38 Studios in particular, arising out of Wells Fargo's due diligence investigations in connection with its prior preparation of the Equity PPM seeking capital for 38 Studios to complete Copernicus." Id. ¶ 78. Regarding the willingness of one party to accept guidance from the other, the Complaint alleges that Wells Fargo prepared the Bond PPM, a draft of which it had prepared even prior to the EDC Board's adoption of the Authorizing Resolution. (Compl. ¶ 114.) Regarding the history of the parties' relationship preceding the incident spawning the alleged breach, although Wells Fargo and the EDC did not have a long preexisting relationship, Wells Fargo began interacting with the EDC by May 2010, and continued to be omnipresent in the deal from that time forward. (Compl. ¶¶ 45-49; Joint Mem. in Supp. Ex. A, Bond PPM.) Thus, the EDC has pled that it rightfully reposed trust and confidence in Wells Fargo. See A. Teixeira & Co., Inc., 699 A.2d at 1387. Therefore, based on these factors and under the circumstances of this case, the EDC has sufficiently pled that Wells Fargo owed a fiduciary duty to the EDC.[30]

As described above, Barclays was also an agent of the EDC. See supra Sec. III.B.2.b.ii. "The existence of an agency supports the finding that a confidential relationship was established between brother and sister, as an agent always stands in the position of a fiduciary to his principal." See Cahill v. Antonelli, 120 R.I. 879, 883, 390 A.2d 936, 939 (1978) (using "confidential" and "fiduciary" interchangeably). Thus, Barclays' position as an agent supports its status as a fiduciary to the EDC. Furthermore, the Complaint has alleged that Wells Fargo bound Barclays, with Barclays' knowledge and agreement, to participate in the preparation of the Bond PPM. See Compl. ¶ 115. Thus, the EDC has pled that it rightfully reposed trust and confidence in Wells Fargo. See A. Teixeira & Co., Inc., 699 A.2d at 1387. Therefore, based on these factors and under the circumstances of this case, the EDC has sufficiently pled that Barclays owed a fiduciary duty to the EDC.

[30] Because the Court finds in favor of the EDC, it need not address the EDC's argument that Wells Fargo aided and abetted Stokes' and Saul's breach of fiduciary duty, an allegation not contained in the Complaint.

Wells Fargo and Barclays (by joining Wells Fargo's arguments) only challenged the existence of a fiduciary duty; they did not argue that the Complaint failed to allege a breach of that duty. Because this Court finds that the Complaint alleges that Wells Fargo and Barclays owed fiduciary duties to the EDC, the Court will not dismiss Count I.

2

Count II: Breach of Fiduciary Duty (Wells Fargo's Hidden Commissions)

Wells Fargo twice asserts that its only argument against Count II (aside from the broad arguments against all counts) is that it owed no fiduciary duty to the EDC. (Wells Fargo Mem. in Supp. 23; Wells Fargo Reply Mem. 17.) As discussed in the analysis of Count I above, Wells Fargo did owe a fiduciary duty to the EDC, thus that argument fails here as well.

However, Wells Fargo also attempts a short argument against the hidden payment as the basis for a breach of fiduciary duty or misrepresentation, even calling it "[p]erhaps the most sensational claim" in the Complaint. (Wells Fargo Mem. in Supp. 14.) But the Court thinks that this is perhaps the most straight-forward allegation in the Complaint. The Complaint alleges that Wells Fargo had the duty "to make full and truthful disclosure of all material facts to the EDC Board and not to omit any material facts that would be necessary to make the facts disclosed not misleading." (Compl. ¶ 222b.) The final paragraph of the BPA states, "The Placement Agent does not anticipate any remuneration with respect to the 2010 Bonds other than the Placement Agent's discount of $634,065.00 and the disclosure fee of $50,000.00." (Pl.'s Ex. 6, BPA ¶ 18, Oct. 22, 2010; Compl. ¶ 157.) Yet, "Wells Fargo fully 'anticipated' and was entitled under its private agreement with 38 Studios to receive additional fees 'with respect to the 2010 Bonds,' as in fact Wells Fargo did." (Compl. ¶ 157.) After the closing of the Bonds, Wells Fargo received $473,512.19 from 38 Studios. (Compl. ¶¶ 151-152.) Thus, Count II states a sufficient claim for

Breach of Fiduciary Duty against Wells Fargo. The contract log raised at oral argument that purported to contain an actual disclosure of this information is not properly before the Court and is irrelevant on a Motion to Dismiss. See Narragansett Elec. Co., 21 A.3d at 277 (testing sufficiency of complaint); Hr'g Tr. 48:4-49:13, June 4, 2013.

In its argument on Count II, the EDC also contends that the 38 Studios Defendants aided and abetted Wells Fargo's alleged breach of fiduciary duty. (Pl.'s Mem in Opp'n 163-64.) The Court need not address this argument because no such claim exists in the Complaint; the 38 Studios Defendants are not even named Defendants as to Count II.

3

Counts III and IV: Fraud and Fraudulent Misrepresentation

Under Super R. Civ. P. 9(b), in a claim for fraud, "the circumstances surrounding the fraud . . . shall be stated with particularity." However, malice, intent, knowledge, and other condition of mind may be averred generally." Id. The purpose of the rule's particularity requirement is to give "fair and specific notice of the alleged fraud." Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 161 (R.I. 2001). The remaining arguments as to Counts III and IV concern whether the Complaint meets this requirement. The Court will consider these arguments as applied to separate groups of defendants.

"To establish a prima facie damages claim in a fraud case, the plaintiff must prove that the defendant made a false representation intending thereby to induce plaintiff to rely thereon and that the plaintiff justifiably relied thereon to his or her damage." Bitting v. Gray, 897 A.2d 25, 34 (R.I. 2006) (citations omitted). "A misrepresentation is 'any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.'" Stebbins v. Wells, 766 A.2d 369, 372 n.4 (R.I. 2001).

a

Officers, Financial Advisor, and Law Firms

Stokes, Saul, First Southwest, and Adler Pollock do not present specific arguments against the fraud counts. Moses Afonso argues that "there are no facts whatsoever" to support claims for fraud. "Th[e] standard of particularity has been interpreted as requiring specification of the time, place, and content of the allegedly false representations." F. Saia Restaurants, LLC v. Pat's Italian Food To Go, Inc. et al., No. PB 12-1294, June 5, 2012, Silverstein, J., at 24.

The EDC's Complaint meets this standard of particularity against Moses Afonso. The Complaint alleges that the Term Sheet contained false statements, which Afonso knew to be false (Compl. ¶¶ 92-94.) Additionally, the Complaint alleges that Afonso drafted the final Authorizing Resolution for the Board, knowing that it contained the false finding concerning adequate provision for completion of the project. (Compl. ¶¶ 100-103.) Finally, Afonso provided details directly to the EDC Board at the July 26, 2010 meeting, but failed to disclose the false finding. (Compl. ¶ 108.) Thus, the Complaint specifies the time, place, and content of the allegedly false representations, and accordingly states a claim for fraud against Moses Afonso.

b

Wells Fargo and Barclays

Wells Fargo argues that the Complaint merely lumps it in with the other Defendants, which is insufficient to state a claim under Rule 9(b) requirements. The Complaint, however, contains specific allegations against Wells Fargo. On June 14, 2010, Wells Fargo made a presentation to the EDC Board where it discussed "revenue projections" and "subscriber growth projections," but "did not inform the EDC Board that 38 Studios' projections as a whole showed

38 Studios running out of money and failing in 2012." (Compl. ¶ 80.) Additionally, Wells Fargo made the false representation about its remuneration from 38 Studios with respect to the bonds as discussed above in Section III.E.1. Finally, Wells Fargo "knew or should have known of [the statement about the sufficiency of money to relocate to Rhode Island and complete Copernicus] in the Term Sheet was both a misrepresentation and contained an omission." (Compl. ¶ 94.) Therefore, the Complaint has sufficiently pled a claim for fraud and fraudulent misrepresentation against Wells Fargo.

Barclays, however, is merely lumped in with the other Defendants. This is readily apparent from the concluding sentence of the EDC's argument for Barclays' liability on these counts in its Memorandum in Opposition: "Because the Complaint states a claim that Defendants Wells Fargo and Barclays were joint venturers, all of Wells Fargo's conduct is imputed to Barclays." (Pl.'s Mem. in Opp'n 170.) As noted above, even on a Motion to Dismiss, the Court need not accept the legal conclusions that Barclays was a joint venturer with Wells Fargo or that all of Wells Fargo's knowledge and actions are imputed to Barclays. See East Greenwich School Dept., 899 A.2d at 1262, n.2; supra Sec. III.B.2.a.ii. Unlike Wells Fargo, who, as discussed, is alleged to have been involved in presentations to the EDC Board and have made misrepresentations regarding its nondisclosure of fees paid by 38 Studios, there is no allegation as to Barclays' actions that induced the EDC to rely thereon. The only specific role alleged as to Barclays was to sell the Bonds as placement agent and prepare the Bond PPM. See Compl. ¶ 115. Although, as noted above, reading the Complaint in the light most favorable to the EDC, Barclays agreed to help prepare the Bond PPM on behalf of the EDC, the Bond PPM was meant to induce investors to buy the Bonds, not for the EDC to make an additional finding or decision. See Compl. ¶¶ 119, 199. Although Paragraph 32 lists a number of actions of all

Defendants, the Complaint does not specify Barclays' role. See Compl. ¶ 32. Thus, the Complaint does not state with adequate particularity Barclays' role in the fraud or fraudulent misrepresentations. Therefore, Counts III and IV are dismissed as to Barclays.

c

38 Studios Defendants

The 38 Studios Defendants argue that Count III of the Complaint fails to state a claim for fraudulent scheme liability, and that Count IV fails to state a claim because it fails to adequately allege that the 38 Studios Defendants have made any actionable misrepresentations and that it fails to state a claim as to Schilling, Zaccagnino, and Wester because they are not named.[31] Although the EDC's Memorandum in Opposition attempts to show fraudulent misrepresentations alleged against Schilling, Zaccagnino, and Wester, Count IV does not name them as defendants. See Pl.'s Mem. in Opp'n ¶¶ 174-77. Only MacLean is a defendant as to Count IV.

The Complaint states a claim for fraud and fraudulent misrepresentation against MacLean through her signing the Term Sheet. The Term Sheet stated that the net proceeds of the bond issuance "would provide the necessary financing to relocate 38 Studios to Rhode Island, complete production of Copernicus, and capitalize the company's growth and expansion in Rhode Island." (Compl. ¶ 92.) MacLean signed the Term Sheet. (Compl. ¶ 106.) Viewing this evidence in the light most favorable to the EDC, the Term Sheet's language supports the interpretation that the "necessary financing" could mean all of the financing needed. The Complaint alleges that MacLean knew that such a statement was a misrepresentation because 38 Studios needed more than $75 million to complete Copernicus and relocate to Rhode Island. Id.

[31] To the extent that the 38 Studios Defendants argue that 38 Studios fully disclosed the material facts to the EDC, that argument is addressed above where the Court found that the 38 Studios Defendants could not impute knowledge of the EDC's officers to the EDC.

¶¶ 92-96, 226, 231. Although the Complaint only states that MacLean "made intentional misrepresentations to the EDC Board and intentionally omitted providing the EDC Board with material information under circumstances where said Defendants had a duty to speak," intent may be alleged generally under Rule 9(b). Thus, the Complaint states a claim against MacLean for fraudulent misrepresentation and her participation in the greater fraud scheme.

While Schilling, Zaccagnino, and Wester did not sign the Term Sheet and are not defendants in Count IV, they are alleged to have participated in the fraud alleged in Count III, along with MacLean. They contend that Count III does not actually allege a scheme, as the EDC argues in its Opposition. However, Paragraph 228 alleges that "Defendants' acts, practices, and courses of business . . . operated as a fraud upon Plaintiff . . . ." (Compl. ¶ 228.) Acts and omissions are detailed earlier in the Complaint. Id. ¶¶ 32, 218. The 38 Studios Defendants also argue that the Complaint does not meet the particularity requirement of Rule 9(b) because it merely lumps all of the defendants together. As noted above, however, MacLean signed the Term Sheet that contained the allegedly fraudulent representation. Id. ¶ 106. Additionally, there are specific allegations as to Schilling, Zaccagnino, and Wester regarding their role in the scheme. The Complaint alleges that Schilling knew that the EDC Board would rely on the Term Sheet prior to the July 26, 2010 meeting and that Schilling attended that meeting where the Authorizing Resolution (and thereby the Term Sheet) were adopted by the EDC Board. Id. ¶¶ 107-110. Zaccagnino and Wester "reviewed the Term Sheet carefully," but, allegedly knowing that it was false, permitted the Term Sheet to be sent to the EDC Board members. Id. ¶¶ 95-96.

4

Count V: Negligent Misrepresentation

a

Did MacLean Owe Duty of Care?

MacLean and Starr argue that Count V should be dismissed because MacLean did not owe a duty of care to the EDC. Indeed, much of the argument at the hearing centered on the extent of a duty. However, the Rhode Island Supreme Court has, at least three times, including just this term, explicitly described the elements of negligent misrepresentation as follows:

> "(1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he [or she] ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation."

Cruz v. DaimlerChrysler Motors Corp., 66 A.3d 446, 453 (R.I. 2013); Manchester v. Pereira, 926 A.2d 1005, 1012 (R.I. 2007); Mallette v. Children's Friend & Service, 661 A.2d 67, 69 (R.I. 1995). "Duty," as such, is not an element of negligent misrepresentation.

A lack of a duty requirement for negligent misrepresentation seems hard to square with the Supreme Court's proclamation that "[a] fundamental principle of tort law . . . is that 'a defendant cannot be liable under a negligence theory unless the defendant owes a duty to the plaintiff.'" Benaski v. Weinberg, 899 A.2d 499, 503 (R.I. 2006). Nevertheless, in Manchester, the Court did not discuss duty in its negligent misrepresentation analysis. See Manchester, 926 A.2d at 1011-12. In Cruz, the Court only mentioned duty in one sentence of dicta: "We agree with plaintiffs that 'when [the dealership] * * * began volunteering information as to the vehicle in question, it assumed a duty not to misinform them.'" Cruz, 66 A.3d at 449. Mallette, however, did analyze the issue of duty. After delineating the above-quoted elements, the Court framed the "narrow issue confronting this court, which is one of first impression, [as] whether to recognize the tort of negligent misrepresentation in the adoption context." Mallette, 661 A.2d at 70. The Mallette Court went on to a duty analysis, primarily centered around similar adoption cases in other states. Id. at 70-73. Thus, although the repeated iteration of the elements of negligent misrepresentation does not directly seem to require proof of a duty, the Court will proceed to a duty analysis.

The parties here make hay out of the language in these decisions, each to its own extreme. The EDC takes the bold position that "in the negligent misrepresentation context the independent duty arises by virtue of the defendant opening his mouth that creates the duty and thereby comes a duty not to misinform." (Hr'g Tr. 145:2-6, June 4, 2013.) MacLean and Starr attempt to cabin Mallette and Cruz essentially to their own facts: adoption and consumer car dealers. (Defs.' Supp. Mem. 3-4.)

"[N]o clear-cut formula for creation of a duty exists that can be mechanically applied to each and every negligence case. The approach is essentially ad hoc and turns on the particular facts and circumstances of a given case." Benaski v. Weinberg, 899 A.2d at 502 (citations omitted). "Malleable and illustrative factors we have recognized include 'the relationship of the parties, the scope and burden of the obligation to be imposed upon the defendant, public policy considerations and notions of fairness.'" Id. (quoting Mallette, 661 A.2d at 70).

Here, the EDC alleges that MacLean assumed a duty by speaking through her signature on the Term Sheet, which "contained the most important terms and conditions for the EDC's loan to 38 Studios, and represented the guidelines for the parties' counsel to prepare the final contract documents." Compl. ¶ 37; see Pl.'s Mem. in Opp'n 177-78; Compl. ¶¶ 95-100, 106.

The EDC alleges that the Term Sheet contained "the false representation that the net proceeds from the EDC would finance completion of Copernicus." (Compl. ¶ 106.) Further, MacLean "knew or should have known that the Term Sheet would be relied upon by the EDC Board." Id. The relationship between the EDC and MacLean related to a $75 million financing deal and implicated the Rhode Island Legislature and other professional service providers. The obligation to be imposed on MacLean—to ensure the accuracy of a document that she signed when knowing that others would rely on it—imposes little or no additional burden above what should be commonplace in complex financing. Public policy and notions of fairness support the creation of a duty to ensure that a document to be signed does not contain a misrepresentation when the document relates to a deal involving a massive amount of money, many private companies, and a state government. Thus, when MacLean attested to the Term Sheet, she assumed a duty to not misrepresent the facts contained therein.[32]

b

Does the Economic Loss Doctrine Bar the Claim?

Generally, "[t]he economic loss doctrine provides that 'a plaintiff is precluded from recovering purely economic losses in a negligence cause of action.'" Franklin Grove Corp. v. Drexel, 936 A.2d 1272, 1275 (R.I. 2007) (quoting Boston Investment Property # 1 State v. E.W. Burman, Inc., 658 A.2d 515, 517 (R.I. 1995)). "In other words, under this doctrine, a plaintiff may not recover damages under a negligence claim when the plaintiff has suffered no personal injury or property damage." Id. Thus, "when parties have contracted to protect against potential

[32] The Court comes to this conclusion on duty by applying the facts and circumstances analysis described. However, the protections of the duty element of an ordinary negligence action seem to be subsumed into the third element of negligent misrepresentation. The Court cannot imagine a situation where a representor could not owe a duty of care but still intend the representation to induce another to act on it. See Cruz, 66 A.3d at 453.

economic liability . . . contract principles override * * * tort principles * * * and, thus, purely economic damages are not recoverable." Id. (citations and internal quotation marks omitted). MacLean and Starr contend that the economic loss doctrine applies and bars the EDC's claim for negligent misrepresentation against them. The EDC argues that the rule does not apply because the Complaint alleges breaches of tort duties that exist independently of contractual duties.

On its face, it seems that the economic loss doctrine would bar the claim against MacLean and Starr given the contractual nature of the Loan and Trust Agreement between the EDC and 38 Studios, but the issue is more nuanced than that. The EDC's primary alleged misrepresentation is MacLean's signing the Term Sheet that contained "the false representation that the net proceeds from the EDC would finance completion of Copernicus." (Compl. ¶ 106.) Signed on July 26, 2010, that alleged misrepresentation predates the Loan and Trust Agreement, which was dated November 1, 2010, by more than three months. Id.; Pl.'s Ex. 7, Loan and Trust Agreement. The EDC has not sued 38 Studios or the 38 Studios Defendants for breach of that agreement.[33]

The New Hampshire Supreme Court recently confronted essentially the same issue: "whether the economic loss doctrine bars recovery for [a negligent misrepresentation] claim between two contracting parties." Wyle v. Lees, 33 A.3d 1187, 1191 (N.H. 2011). The court identified root beneath the surface by stating, "The source of this struggle is the inherent tension 'between negligent misrepresentation, which allows for the recovery of pecuniary loss, and the economic loss rule, which forbids recovery of economic loss in tort.'" Id. (quoting Barton,

[33] Although Starr contends that the allegation in Paragraph 196 of the Complaint—negligent failure to include a provision in the Loan and Trust Agreement—is "precisely what the economic loss doctrine does not allow," Paragraph 196 does implicate the 38 Studios Defendants (and therefore Starr). See Starr Reply Mem. 7-8; Compl. ¶ 196. The pronoun "they" in Paragraph 196 presumably refers to the Defendants named in Paragraph 195: Stolzman, Adler Pollock, Moses Afonso, Afonso, First Southwest, Stokes, and Saul. (Compl. ¶¶ 195-96.)

Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims, 41 Wm. & Mary L. Rev. 1789, 1796–97 (2000)).

The New Hampshire Supreme Court noted that "[m]any courts have distinguished those negligent misrepresentation claims that center upon an alleged inducement to enter into a contract from those that focus upon performance of the contract." Id. (citing law review article and cases from the Seventh and Eight Circuits). The court noted that this distinction was consistent with the economic loss doctrine, concluding that "it differentiates between negligence claims based merely upon the breach of a contractual duty, the risks of which could have been allocated by the parties in their agreement, and those claims that are entirely separate and distinct from the material terms of the agreement." Id. "In other words, where the misrepresentation of present fact serves as an inducement for the contract, it is not duplicitous of the breach of contract claim." Id. at 191-92 (citations omitted). The Washington Supreme Court has stated a broader rule, similarly distinguishing between independent tort duties and contractual performance duties, noting other states' agreement:

> "In sum, the economic loss rule does not bar recovery in tort when the defendant's alleged misconduct implicates a tort duty that arises independently of the terms of the contract. In some circumstances, a plaintiff's alleged harm is nothing more than a contractual breach or a difference in the profits, revenue, or costs that the plaintiff had expected from a business enterprise. In other circumstances, however, the harm is simultaneously the result of the defendant breaching an independent and concurrent tort duty. Thus, while the harm can be described as an economic loss, it is more than that: it is an injury remediable in tort. The test is not simply whether an injury is an economic loss arising from a breach of contract, but rather whether the injury is traceable also to a breach of a tort law duty of care arising independently of the contract."

Eastwood v. Horse Harbor Foundation, Inc., 241 P.3d 1256, 1264 (Wash. 2010) (noting agreement of South Carolina, Illinois, New York, and Colorado).

These rules are consistent with the Rhode Island Supreme Court's jurisprudence of the economic loss doctrine. From the outset of its latest statement on the doctrine, the Court stated that purely economic damages are not recoverable "when parties have contracted to protect against potential economic liability . . . ." Franklin Grove Corp., 936 A.2d at 1275. The implication is that economic damages are available when the parties have not contracted to protect against potential economic liability. Although Franklin Grove Corp. focuses the rationale for the doctrine on commercial transactions, that is because the case was written in the context of the difference in the applicability of the doctrine in commercial versus consumer transactions. The case went on to describe that a contractual duty "arises from society's interest in the performance of promises" and that contract principles are generally more appropriate than tort principles "for determining claims for consequential damage that the parties have, or could have, addressed in their agreement." Id. (quoting E.W. Burman, Inc., 658 A.2d at 517-18) (emphasis added). Thus, the economic loss doctrine would not apply when the issue does not relate to the performance of contractual promises or when the parties did not address or would not consider addressing the issue in the contract. This rule is even more poignant when the issue relates to the time before contract formation because the contract itself is voidable. See Halpert v. Rosenthal, 107 R.I. 406, 416, 267 A.2d 730, 735 (1970) (noting that both innocent and fraudulent misrepresentations render a contract voidable).

Here, the economic loss doctrine does not bar the EDC's claim for negligent misrepresentation against MacLean and Starr (derivatively). While the relationship between the EDC and 38 Studios culminated in the Loan and Trust Agreement, the Complaint alleges a negligent misrepresentation that occurred before that agreement, induced that agreement, and relates to an independent duty. The Complaint alleges that MacLean knew or should have known that the EDC would rely on the Term Sheet representations, thus inducing the EDC to proceed with the deal. See Wyle, 33 A.3d at 1191-92; Compl. ¶ 106. The facts alleged in the Complaint support the distinction between the alleged negligent misrepresentation and the contract even more so because the misrepresentation in the Term Sheet occurred more than three months prior to the signing of the Loan and Trust Agreement. (Compl. ¶ 106; Pl.'s Ex. 7, Loan and Trust Agreement.) Furthermore, the duty not to misrepresent is separate from any duties in the Loan and Trust Agreement. See Eastwood, 241 P.3d at 1264; supra Sec. III.E.4.a (discussing MacLean's duty for purposes of negligent misrepresentation). Thus, the EDC's Complaint "allege[s] 'independent, affirmative misrepresentations unrelated' to the performance of the contract." Wyle, 33 A.3d at 1192. This conclusion fits the rationale for the economic loss doctrine because it is unlikely that the parties would "contract to protect against potential economic liability" stemming from preexisting misrepresentations or misrepresentations made in contract negotiations. Franklin Grove, 936 A.2d at 1275. The EDC has alleged misrepresentations that do not arise from the performance of promises in the Loan and Trust Agreement. See id. at 1276. Nor would such an issue be something that the parties would have addressed in their agreement because it would be highly unusual for two contracting parties to discuss and contract to terms regarding what happens if one of the parties is misrepresenting a fact during the negotiation.

Therefore, the economic loss doctrine does not bar the EDC's claim for negligent misrepresentation against MacLean and Starr.

5

Count VI: Legal Malpractice

"[T]o prevail on a legal malpractice claim, 'a plaintiff must prove by a fair preponderance of the evidence not only a defendant's duty of care, but also a breach thereof and the damages actually or proximately resulting therefrom to the plaintiff.'" Ahmed v. Pannone, 779 A.2d 630, 632-33 (R.I. 2001) (quoting Macera Brothers of Cranston, Inc. v. Gelfuso & Lachut, Inc., 740 A.2d 1262, 1264 (R.I. 1999) (per curiam)). An attorney's duty includes "providing competent representation to the client, including the utilization of competent legal knowledge, skill, thoroughness and case preparation reasonably necessary both to protect and to advance the client's interests." Vallinoto v. DiSandro, 688 A.2d 830, 834 (R.I. 1997).

Above, the Court concluded that the knowledge of Stokes and Saul should not be imputed to the EDC as it relates to the Law Firms because they were agents of the EDC. Additionally, after concluding that imputation did not work for the 38 Studios Defendants on a collusion theory, the Court noted that the collusion theory would also apply to the Law Firms. See supra footnote 23. The primary argument of the Law Firms as to Count VI is that their communications to Stokes and Saul were sufficient disclosures to the EDC itself, i.e., they did not have a duty to go beyond Stokes and Saul to disclose information to the EDC Board. As the collusion aspect of imputation and agency principles is relevant here, the Court will expound on that as to the Law Firms.

The Law Firms "knowingly and intentionally participated in" a number of acts and practices. (Compl. ¶ 32.) As detailed above, these acts lend themselves to concerted action. Even more to the point, the Law Firms played particularly key roles in these acts as they were involved in drafting many of the key documents, and they communicated directly with the EDC

Board. Afonso and Stolzman prepared the Authorizing Resolution, and Afonso "provided details" to the EDC Board at the EDC Board meeting but omitted the projected shortfall. Id. ¶¶ 107-08. Stolzman was the person who circulated the Term Sheet drafts and ultimately "procured MacLean's and Stokes' signatures" on it, with the Term Sheet allegedly containing the false representation that the net proceeds from the EDC would finance completion of Copernicus. Id. ¶¶ 92, 106. Additionally, the Law Firms allegedly played key roles in the failure to procure an initial assessment and third party monitoring. "Defendants Stolzman, Adler Pollock, Moses Afonso, and First Southwest deliberately chose to omit any obligation for an initial assessment when they failed to expressly refer to the initial assessment in the Term Sheet . . . ." Id. ¶ 188. Their failure on the third party monitoring front is alleged to have included Stokes and Saul. Id. ¶¶ 189-94. Finally, the Complaint alleges that Stolzman and Saul knew about the EDC analyst's negative thoughts about the transaction, but did not pass on the information to the EDC Board and then excluded the analyst from further analysis of the transaction. Id. ¶¶ 60-64. Thus, as the Court stated in regard to the 38 Studios Defendants above, the Law Firms were part of a greater concert of action that included Stokes and Saul. Just as with the more general imputation section above, the Law Firms cannot hide behind their interactions with the corporate officers, when the Law Firms knew that the officers were involved in the allegedly wrongful conduct.

Rule 1.13 of the Rhode Island Rules of Professional Conduct governs a lawyer's relationship with an organizational client. "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." R.I. R. Prof'l Conduct 1.13(a). "An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents." Id. at 1.13 cmt. 1. Although a lawyer may be interacting with the corporation through a certain constituent,

> "If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law."

Id. at 1.13(b). "The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body." Id. at 1.13 cmt. 5.

Here, the duty in Rule 1.13(b) is triggered. As previously stated, the Complaint alleges that the Law Firms knew that the officers they were reporting to, Stokes and Saul, were engaged in collusive activity, preventing the EDC Board from receiving full disclosure of the risks associated with the loan. The Complaint alleges that these actions were a breach of Stokes' and Saul's fiduciary duties to the EDC, as well as part of a fraud. Furthermore, given the legal constraints imposed on the EDC by statute, the Complaint alleges that these actions also violated state law. Id. ¶¶ 103, 105. The EDC has alleged that the conduct would likely result in substantial injury to the corporation given that it related to a $75 million loan that would inadequately capitalize 38 Studios. This triggers the lawyer's obligation to "proceed as is reasonably necessary in the best interest of the organization" regarding the lawyer's interaction with the corporation. R.I. R. Prof'l Conduct 1.13(a). A determination of what is reasonably necessary is an issue of fact, not appropriate for resolution on a Motion to Dismiss. It is sufficient at this stage that the EDC has alleged that the information was not disclosed up the chain to the EDC Board.

Adler Pollock also argues that even if it was required to communicate information directly to the EDC Board under the ethical rule, that "would not establish liability for malpractice." (Adler Pollock Mem. in Supp. 17.) However, the standard on a Motion to Dismiss is whether, reading the Complaint in the light most favorable to the Plaintiff, the Complaint states a claim upon which relief may be granted. The Rhode Island Supreme Court has used the ethical rules as a guide to legal malpractice duties. See Vallinoto, 688 A.2d at 834. The EDC has alleged that the Law Firms breached that rule and that the EDC suffered an injury. Thus, Count VI sufficiently states a claim for Legal Malpractice. Narragansett Elec. Co., 21 A.3d at 277 (court's function is to test sufficiency of the complaint).

6

Count VII: Negligence

"'It is well settled that to prevail on a claim of negligence a plaintiff must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage.'" Nationwide Prop. & Cas. Ins. Co. v. D.F. Pepper Const., Inc., 59 A.3d 106, 110 (R.I. 2013) (quoting Habershaw v. Michaels Stores, Inc., 42 A.3d 1273, 1276 (R.I. 2012)). Adler Pollock, Moses Afonso, Wells Fargo, Barclays, and First Southwest do not present any arguments specifically to this count; any arguments that would serve to dismiss this count have been addressed above. Starr Indemnity, however, seeks dismissal on the basis that (1) 38 Studios did not owe the EDC a duty of reasonable care in negotiating the loan, and (2) it is barred by the economic loss doctrine.

The EDC's entire argument on the economic loss doctrine as applied to Count VII rests upon its previously-made argument as applied to Count V. See Pl.'s Mem. in Opp'n 198 ("Starr Indemnity's arguments that the economic loss doctrine applies to this claim should also be rejected for the reason, discussed supra at 178-181, that the economic loss doctrine does not apply to tort-based claims.") To the extent that the EDC relies on MacLean's negligence in signing the Term Sheet on behalf of 38 Studios, the EDC would be alleging precisely the same conduct to satisfy two separate negligence-based counts. MacLean is not a named defendant in Count VII. Outside of that, the EDC argues that the facts relating to this count "concern 38 Studios' contract with IBM . . . ." (Pl.'s Mem. in Opp'n 195.) "[T]he Complaint alleges that 38 Studios failed to give IBM the financial information it needed to complete this assessment." Id. at 196 (citing Compl. ¶ 212). In attempting to assert the existence of a viable duty, the EDC argues that "Plaintiff may assert a negligence claim against 38 Studios arising out of its failure to exercise reasonable care in connection with its contract with IBM." Id. Suing Starr (through 38 Studios) on this negligence theory is nothing more than an attempt to shirk the provisions of the EDC's own contracts with 38 Studios. The Complaint alleges that the EDC entered into a Project Monitoring Agreement with 38 Studios purporting to assign all of 38 Studios' rights against IBM to the EDC. (Compl. ¶ 193.) Additionally, in the Loan and Trust Agreement, 38 Studios, as Obligor, made the following covenant to the EDC:

> "Third Party Monitoring. Fully cooperate with the implementation of a third party monitoring, reporting and response process regarding the development schedule and budget for Project Copernicus to assure that the Obligor's development of Project Copernicus remains on time and on budget. The third party monitor will be IBM and the process will generally consist of those provisions set forth in the Monitoring Agreement dated the Date of Issuance by and between Obligor and the Corporation."

Loan and Trust Agreement § 6.01A(l). Thus, 38 Studios and the EDC addressed this very issue in multiple contracts between those two entities. See Franklin Grove Corp., 936 A.2d at 1275. The issue relates to 38 Studios' performance of promises in the contracts, not a duty separate and apart from those contracts. See id.; Wyle, 33 A.3d at 1191-92. Therefore, the economic loss doctrine bars the EDC's claim for negligence against Starr Indemnity.[34]

7

Count VIII: Breach of Implied Covenant of Good Faith and Fair Dealing

Apart from broader arguments already addressed, Moses Afonso appears to be the only Defendant to present an argument specifically as to Count VIII, albeit brief. See Pl.'s Mem. in Opp'n 199; Moses Afonso Reply Mem. 32. Moses Afonso argues that this claim fails because the EDC does not allege "a breach of contract claim against Afonso" or that "Afonso has exercised any rights under the contract in bad faith." (Moses Afonso Reply Mem. 32.)

"It is well settled that there is an implied covenant of good faith and fair dealing between parties so that the contractual objectives may be achieved." Takian v. Rafaelian, 53 A.3d 964, 973 (R.I. 2012) (citations omitted). This requirement arises only after a binding contract is formed. Id. There is no requirement that a "breach of contract claim" be alleged with a claim for a breach of good faith and fair dealing. In fact, the Rhode Island Supreme Court seems to have said that there is no separate, independent tort for breach of good faith and fair dealing when breach of contract is alleged. A.A.A. Pool Service & Supply, Inc. v. Aetna Cas. & Sur. Co., 121 R.I. 96, 98-99, 395 A.2d 724, 725-26 (1978) (holding no independent cause of action for bad-faith withholding of a payment when also bringing cause of action for breach of standard fire insurance policy).

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[34] Because the Court concludes that the economic loss doctrine bars this claim against Starr, the Court need not address whether 38 Studios owed a duty to the EDC.

Here, viewing the Complaint in the light most favorable to the EDC, the Complaint alleges that Moses Afonso and the EDC entered into a contract for legal services. See A.F. Lusi Constr., Inc., 934 A.2d at 795; Compl. ¶ 13. The Complaint also alleges that, in performance of those legal services, acted in bad faith by, inter alia, acting in concert with other Defendants to prevent the disclosure of certain information to the EDC Board. See, e.g., Compl. ¶¶ 32, 65-70, 79, 82, 105-106, 110 and 120. To the extent that this claim is duplicative with other claims, that issue will be resolved at a later stage. See supra Sec. III.D.3.b. Therefore, the Court will not dismiss Count VIII as to any Defendant.

8

Count IX: Damages under R.I. Gen. Laws § 42-64-9.3 (Criminal Penalties Including Damages for Violating R.I. Gen. Laws § 42-64-1 et seq.)

The EDC has the authority to institute and prosecute proceedings to enforce G.L. 1956 § 42-64-1 et seq. See § 42-64-9.4(b) ("Proceedings for enforcement may be instituted and prosecuted in the name of the corporation."). Sec. 42-64-9.3(a) provides:

> "No person shall knowingly make any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or by any permit, rule, regulation or order issued under those sections, and no person shall falsify, tamper with or knowingly render inaccurate any monitoring device or method required to be maintained under this chapter or by any permit, rule, regulation or order issued under those sections."

In addition to the possibility of a fine and imprisonment, which are not sought here, § 42-64-9.3(g) permits the corporation to seek "damages directly related to the violation" from the person liable under the section. G.L. 1956 § 11-1-3 provides:

> "Every person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense, shall be proceeded against as principal or as an accessory before the fact, according to the nature of the offense committed, and upon

> conviction shall suffer the like punishment as the principal offender is subject to by this title."

No Defendant challenged the applicability of the aiding and abetting statute to the EDC's ability to enforce § 42-64-1 et seq. with criminal penalties.

a

Do the warranties in the BPA preclude this claim?

Wells Fargo argues that the EDC cannot sue Wells Fargo for violations of Rhode Island law when the BPA recites warranties that the documents do not violate the law. See Compl. ¶¶ 133-39. However, as noted above, Wells Fargo drafted or at least reviewed many of the documents that were related to the BPA. See Sec. III.B.2.a.ii. It also participated in the exchange of information that led the EDC to agree to the BPA. Furthermore, the BPA is signed for the EDC by Stokes, who is also alleged to be a participant in the collusive activity that allegedly harmed the EDC. Thus, the force of BPA's warranties, viewed in the light most favorable to the EDC, is minimal given that there is a possibility that the BPA may be void or voidable. While the warranties in the BPA may provide a defense in a later motion or trial, on this Motion to Dismiss, the warranties in the BPA do not cause the Complaint to fail to state a claim upon which relief can be granted. See McKenna v. Williams, 874 A.2d at 225 (complaint need only state a claim under "any conceivable set of facts").

b

Is the claim pled with sufficient particularity?

Some Defendants' broad particularity arguments may apply to this count. However, the EDC has specifically alleged documents that were submitted to the EDC: the Term Sheet, the Authorizing Resolution, the Bond PPM, and the BPA. The Complaint also alleges the roles played by certain defendants, i.e., drafting, preparing, reviewing, signing, etc. See, e.g., Compl.

¶¶ 50, 85, 100, 114-15, 119, 125, 186. Therefore, the Complaint has met the particularity requirement and Count IX states a claim upon which relief can be granted. See F. Saia Restaurants, LLC, No. PB 12-1294, at 24 (requiring specification of the time, place, and content of allegedly false representations).

9

Count XI: Civil Damages under R.I. Gen. Laws § 9-1-2 Based upon Violations of R.I. Gen. Laws §§ 11-18-1, 11-18-6, 11-18-7, 11-18-8, or 11-41-4

G.L. 1956 § 9-1-2 provides that when a person is injured "by reason of the commission of any crime or offense, he or she may recover his or her damages for the injury in a civil action against the offender." It entitles the person injured as a result of a crime to "a right of action where none existed at common law." Mello v. DaLomba, 798 A.2d 405, 411 (R.I. 2002). The burden of proof relates to the civil action; thus, the Plaintiff must prove "by a preponderance of the evidence that defendants violated" the applicable statute. Cady v. IMC Mortgage Co., 862 A.2d 202, 215 (R.I. 2004). No defendant challenges the applicability of aider and abettor liability. See G.L. 1956 § 11-1-3. As with Count IX, Wells Fargo's argument to dismiss because the BPA contained warranties regarding a lack of violation of law similarly does not bar the EDC's claim for damages here.

The EDC alleges violations of five Rhode Island criminal statutes: §§ 11-18-1 (Giving false document to agent, employee, or public official), 11-18-6 (False financial statement to obtain loan or credit), 11-18-7 (Procuring loan or credit on faith of false statement), 11-18-8 (False representations as to continuing truth of financial statements), and 11-41-4 (Obtaining property by false pretenses or personation). No Defendant appears to directly challenge the sufficiency of the Complaint as to the underlying statutory violations. The 38 Studios

Defendants raise a particularity argument, essentially just referring to previous arguments regarding common law fraud claims. (38 Studios Defs.' Mem. in Supp. 47-48.) The Complaint and this Decision have now repeatedly detailed the allegedly false representations made in the Term Sheet, BPA, and elsewhere. As this Court has found that those claims met the particularity requirements of Rule 9(b), so do the allegations in Count XI.

10

Counts XII and XIII: R.I. RICO

The EDC brings two separate counts under two separate subsections of the Rhode Island General Laws chapter covering Racketeer Influenced and Corrupt Organizations (RICO). G.L. 1956 § 7-15-2(a) provides:

> "It is unlawful for any person who has knowingly received any income derived directly or indirectly from a racketeering activity or through collection of an unlawful debt, to directly or indirectly use or invest any part of that income, or the proceeds of that income in the acquisition of an interest in, or the establishment or operation of any enterprise."

Additionally, § 7-15-2(c) provides: "It is unlawful for any person employed by or associated with any enterprise to conduct or participate in the conduct of the affairs of the enterprise through racketeering activity or collection of an unlawful debt."

"Racketeering activity" includes any act or threat involving larceny. Sec. 7-15-1(c). A "person" includes "any individual or entity capable of holding a legal or beneficial interest in property." Id. § 7-15-1(b). An "enterprise" is "any sole proprietorship, partnership, corporation, association, or other legal entity, and any union or group of individuals associated for a particular purpose although not a legal entity." Id. § 7-15-1(a). The EDC has alleged that 38 Studios was an enterprise. (Compl. ¶ 276.)

To the extent that Defendants argue that imputation, a lack of a false representation, or an insufficient allegation of fraud bar a claim under Rhode Island's RICO statute, those arguments have been addressed and rejected above.[35] Some Defendants also contend that this Count lacks particularity. For the same reasons that the Court found supra that the allegations for fraud were stated with particularity, so have the allegations here been stated with particularity. The Court's earlier finding that there was a sufficient concert of action to fit into the Collusion Exception to imputation bolsters the allegations of participation in the racketeering activity and enterprise. See supra Sec. III.B.2.c. As to Barclays, however, as discussed in the section above on fraud, the Complaint fails to state a claim because there are no allegations about Barclays' own wrongdoing. See supra Sec. III.E.3.b. Here, the EDC argues merely that "Plaintiff has stated RICO violations as to Barclays, which Barclays committed through its agent, Wells Fargo." (Pl.'s Mem. in Opp'n 219.) As discussed above, Wells Fargo was only Barclays' agent for the purpose of binding Barclays to the BPA as a placement agent. See supra Sec. III.2.a.ii. Therefore, Counts XII and XIII are dismissed as to Barclays.

Outside of these arguments, Wells Fargo argues that the EDC did not allege that Wells Fargo used or invested any proceeds from the purported larceny in furtherance of the enterprise as required by the statute. Both sides argue this point without distinguishing between the two RICO subsections and two corresponding counts in the Complaint; their starting point is State v. Brown, 486 A.2d 595, 599 (R.I. 1985), which states, more generally, that "the elements of a RICO offense are (1) the commission of one act of racketeering activity and (2) the use or

[35] The 38 Studios Defendants argue that the EDC did not adequately plead a "racketeering activity." (38 Studios Defs.' Mem in Supp. 48.) However, they argue that the Complaint does not properly allege larceny by false pretenses "[b]ecause the EDC has failed to state a claim against the 38 Studios Defendants for fraud[.]" Id. at 49. As discussed above, the Complaint states a claim for fraud against the 38 Studios Defendants.

investment of the proceeds of the racketeering activity in the establishment, conduct, or operation of an enterprise." Nevertheless, because the subsections are different, the Court will address Wells Fargo's argument as applied to each separate subsection.

a

Count XII: R.I. RICO subsection (a)

G.L. 1956 § 7-15-2(a) provides:

> "It is unlawful for any person who has knowingly received any income derived directly or indirectly from a racketeering activity or through collection of an unlawful debt, to directly or indirectly use or invest any part of that income, or the proceeds of that income in the acquisition of an interest in, or the establishment or operation of any enterprise."

This subsection is where the Rhode Island Supreme Court derived the second "element" of a RICO offense: "the use or investment of the proceeds of the racketeering activity in the establishment, conduct, or operation of an enterprise" element. Brown, 486 A.2d at 599.

The EDC alleges that Wells Fargo received a commission for its role as placement agent and fees and expenses for its work done for 38 Studios. (Compl. ¶¶ 145, 151-52.) However, the Complaint does not allege what Wells Fargo did with that money; there are no allegations that Wells Fargo used or invested that money in the operation of the alleged enterprise, i.e., 38 Studios. See § 7-15-2(a); Brown, 486 A.2d at 599. Therefore, Count XII, alleging a violation of § 7-15-2(a), fails to state a claim upon which relief can be granted against Wells Fargo.

b

Count XIII: R.I. RICO subsection (c)

As a separate prohibited activity, § 7-15-2(c) provides: "It is unlawful for any person employed by or associated with any enterprise to conduct or participate in the conduct of the affairs of the enterprise through racketeering activity or collection of an unlawful debt." There is no requirement of use or investment of proceeds in subsection (c). See id. The Complaint alleges that Wells Fargo was employed by and associated with 38 Studios through its work on the Equity PPM. See Compl. ¶ 116 ("Defendant Wells Fargo had been retained by 38 Studios to assist 38 Studios in obtaining private equity investment totaling $25 million, had prepared the Equity PPM, and had given the Equity PPM to Defendants Stolzman, Afonso, and First Southwest."). Furthermore, the Complaint alleges that MacLean committed larceny (a racketeering activity), and Wells Fargo participated in that larceny through its non-disclosures regarding the Term Sheet. (Compl. ¶ 94.) Therefore, the Complaint does state a claim against Wells Fargo as it applies to Count XIII.

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Count XIV: Civil Conspiracy

"To prove a civil conspiracy, plaintiffs ha[ve] to show evidence of an unlawful enterprise." Reed & Lundy, Inc. v. Washington Trust Co. of Westerly, 840 A.2d 1099, 1102 (R.I. 2004). "[C]ivil conspiracy is not an independent basis of liability." Id. "It is a means for establishing joint liability for other tortious conduct; therefore, it 'requires a valid underlying intentional tort theory.'" Id. (quoting Guilbeault v. R.J. Reynolds Tobacco Co., 84 F. Supp. 2d 263, 268 (D.R.I. 2000)). Thus, "[a] civil conspiracy claim requires the specific intent to do something illegal or tortious." Guilbeault, 84 F. Supp. 2d at 268. "In order to establish a civil conspiracy, there must be evidence from which a party 'may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise.'" Fleet Nat. Bank v. Anchor Media Television, Inc., 831 F. Supp. 16, 45 (D.R.I. 1993) (quoting Thompson Trading, Ltd. v. Allied Breweries Overseas Trading, Ltd., 748 F. Supp. 936, 945 (D.R.I.1990); Stubbs v. Taft, 88 R.I. 462, 468, 149 A.2d 706, 708–09 (1959)).

To the extent that Defendants argue that the claims should be dismissed for the same reasons that fraud allegations should be dismissed, those arguments have been addressed and rejected above. See supra Sec. III.E.3. To the extent that the Defendants argue that there are insufficient allegations of agreement among the Defendants, those arguments fail as well, except as to Barclays (as discussed below). In addition to the direct allegations in Count XIV (¶¶ 290-94), the Complaint alleges that Stolzman, Adler Pollock, Moses Afonso, Afonso, Saul, MacLean, Zaccagnino, Wester, and First Southwest agreed to, or were at least aware of, the version of the Term Sheet that would be presented to the EDC Board. (Compl. ¶ 96.) Wells Fargo was also privy to this version of the Term Sheet. Id. ¶¶ 92-94. Additionally, Wells Fargo and 38 Studios agreed to an arrangement for Wells Fargo to obtain financing for the EDC. Id. ¶¶ 148-50. These allegations are sufficient to reasonably infer the joint assent of the parties to the submission of false information to the EDC Board. Therefore, Count XIV sufficiently states a claim for civil conspiracy as to all Defendants except Barclays.

The EDC's argument as to Barclays is merely that "[t]he Complaint alleges that Barclays participated in the conspiracy through Wells Fargo." (Pl.'s Mem. in Opp'n 221.) As discussed above, this is insufficient to show that Barclays agreed to join the unlawful or tortious enterprise. See supra Sec. III.B.2.a.ii. Such an allegation is particularly lacking when the allegation is conspiracy. See Rhode Island Resource Recovery Corporation v. Albert G. Brien, et al., No. PB 10-5194, filed July 16, 2012, Silverstein, J., at 24 (citing Stubbs v. Taft, 88 R.I. 462, 464-68, 149 A.2d 706, 707-09 (1959)) ("Where the allegations charging a civil conspiracy are conclusions of law and not statements of fact that demonstrate the defendants conspired, a plaintiff fails to allege sufficient allegations from which an intent to conspire may reasonably be inferred."). Therefore, Count XIV fails to state a claim as to Barclays.

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Counts X, XV, XVI: Mandatory Final Injunction Pursuant to EDC Enforcement Powers, Unjust Enrichment, and Declaratory Relief on Liability

Count X was dismissed above, and arguments pertaining to Counts XV and XVI were addressed in full in previous sections. No further discussion of these counts is necessary.

IV

Conclusion

For the foregoing reasons, the Court has dismissed some counts as to some Defendants and found that the EDC cannot recover for some of its alleged damages. Regarding the arguments against damages, the EDC cannot recover for (1) a $75 million loss from the Defendants because it did not lose $75 million in the transaction; (2) damage to its reduced ability to issue bonds because the Jobs Creation Guaranty Program no longer exists; and (3) a possible future obligation for bond-service payments because it is not ripe for review. The EDC may recover for (1) its liability for the General Assembly's appropriation of funds; (2) injury to its reputation and credit; and (3) the fees and salaries paid to the Defendants. Count X is dismissed in its entirety without prejudice. Barclays is dismissed from Counts III, XII, XIII and XIV. Count VII is dismissed as to Starr. Count XII is dismissed as to Wells Fargo. Regarding the specific counts and Defendants, the following chart summarizes which counts and which Defendants have been dismissed:

<u>Count</u>	<u>Result</u>
I Breach of Fiduciary Duty	Remains as to all. *****
II Breach of Fiduciary Duty (Wells Fargo's Hidden Commissions)	Remains as to all.
III Fraud	Dismissed as to Barclays. All other Defendants Remain.
IV Fraudulent Misrepresentations and Omissions	Dismissed as to Barclays. All other Defendants Remain.
V Negligent Misrepresentation	Remains as to all.
VI Legal Malpractice	Remains as to all.
VII Negligence	Dismissed as to Starr.
VIII Breach of Implied Covenant of Good Faith and Fair Dealing	Parties stipulated to dismissal of Starr. All other Defendants remain.
IX Damages under R.I. Gen. Laws § 42-64-9.3 (Criminal Penalties Including Damages for Violating R.I. Gen. Laws § 42-64-1 <u>et</u> <u>seq.</u>)	Remains as to all.
X Mandatory Final Injunction Pursuant to EDC Enforcement Powers	Dismissed in its entirety.
XI Civil Damages under R.I. Gen. Laws § 9-1-2 Based upon Violations of R.I. Gen. Laws §§ 11-18-1, 11-18-6, 11-18-7, 11-18-8, or 11-41-4)	Remains as to all.
XII R.I. RICO (subsection (a))	Dismissed as to Wells Fargo and Barclays. All other Defendants remain.
XIII R.I. RICO (subsection (c))	Dismissed as to Barclays. All other Defendants Remain.
XIV Civil Conspiracy	Dismissed as to Barclays. All other Defendants Remain.
XV Unjust Enrichment	Remains as to all.
XVI Declaratory Judgment	Remains to the extent that Counts I-XV remain.

***As used in the above chart as to each Count, the word "all" refers to the Defendants named in said Count.**

Counsel shall endeavor to agree on an order consistent herewith. Failing that, competing proposed orders shall be filed timely to be heard at the September 13, 2013 status conference.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Rhode Island Economic Development Corporation v. Wells Fargo Securities, LLC, et al.
CASE NO:	PB 12-5616
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 28, 2013
JUSTICE/MAGISTRATE:	Silverstein, J.

ATTORNEYS:

For Plaintiff:	Max Wistow, Esq.; Stephen P. Sheehan, Esq.; Benjamin G. Ledsham, Esq.
For Defendant:	***See attached list**